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OF  
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EDITED BY

HOWARD J. ROGERS, A.M., LL.D.

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### JUSTINIAN IN COUNCIL

*Photogravure from the Painting by Jean Joseph Benjamin-Constant.*

This famous painting was originally exhibited in the Paris *Salon* of 1888, and was presented in 1890 by G. Mannheimer to the Metropolitan Museum of Art in New York. Justinian, surnamed the Great, was the last Emperor of Constantinople, who in the sixth century, by his dominion over the whole of Italy, reunited in some measure the ancient Empire of the Cæsars. The glory of his reign is the famous digest of Roman law, known to fame as the Justinian Code. The scene depicted in Benjamin-Constant's painting is a slave reading before Justinian and his Cabinet some portion of this celebrated code.



1850-1851

1850-1851

The present painting was originally exhibited in the Paris Salon of 1851. It was then purchased by the Government of the United States and placed in the collection of the Library of Congress. The painting is a reproduction of the original work by the artist, which was exhibited in the Paris Salon of 1851. The painting is a reproduction of the original work by the artist, which was exhibited in the Paris Salon of 1851. The painting is a reproduction of the original work by the artist, which was exhibited in the Paris Salon of 1851.

# INTERNATIONAL CONGRESS OF ARTS AND SCIENCE

*EDITED BY*

HOWARD J. ROGERS, A.M., LL.D.

DIRECTOR OF CONGRESSES

VOLUME XIV

## JURISPRUDENCE AND SOCIAL SCIENCE

COMPRISING

Lectures on International Law, Private Law, Legislation,  
Constitutional Law, The Rural Community,  
The Urban Community, The Family,  
The Industrial Group, and  
Industrial Evolution



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PAUL B. PHOTO



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## DEPARTMENT XXI — JURISPRUDENCE

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(Hall 3, September 20, 4.15 p. m.)

CHAIRMAN: PROFESSOR GEORGE W. KIRCHWEY, Columbia University.  
SPEAKERS: PRESIDENT CHARLES W. NEEDHAM, The George Washington University.  
PROFESSOR JOSEPH H. BEALE, Harvard University.

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### THE FUNDAMENTAL IDEAS AND CONCEPTIONS OF JURISPRUDENCE

BY CHARLES WILLIS NEEDHAM

[Charles Willis Needham, President of The George Washington University. b. Castile, Wyoming County, New York, September 30, 1848. B.L. Albany Law School, 1870; LL.D. University of Rochester and Georgetown College, Kentucky. Trustee of Columbian University, 1893-98; Dean of School of Comparative Jurisprudence and Diplomacy, 1898-1902; Professor of Transportation and Interstate Commerce, Trusts, and Trade-Unions, Columbian University; appointed by President McKinley in 1900 a delegate to Congrès internationale du Droit comparé. Member of American Bar Association; Geographic Society; American Economic Society; Cosmos Club, Washington, D. C.]

THE limit of this paper will not permit me to state, certainly not to discuss, the definitions and opinions of many distinguished authors who have written upon this subject. My aim shall be to state and illustrate what seems to me to be the true fundamental ideas and conceptions of what is called jurisprudence.

Like all concepts, the idea conveyed by the word "jurisprudence" has passed through stages of change and development. To define clearly the present, and may I say the highest, conception, it is necessary to review briefly these changes and thus arrive at a definition of the subject to be discussed.

In its earlier, if not its original use, this word "jurisprudence" signified simply a knowledge of the laws of state. Among the Romans it meant the knowledge of the laws recognized, administered, and enforced under the Roman rule. This idea required the student pursuing the subject to learn the rules of human conduct, of rights, of obligations, and of remedies laid down by the juris-consults and enforced by the courts within the Roman dominion. The study of jurisprudence meant the study of the positive, municipal law enforced or enforcible within a given territory. In short, it was the "study of law," using a phrase now in common use and familiar to every member of the profession. This original use of the word marks the beginning of what is termed the systematic study of the laws of a nation — the classification and codification of law.

With the growth of the philosophical spirit and the scientific method in the domain of learning, this original and practical conception of jurisprudence gradually changed. Scholars and writers arose who wanted to know the reasons for these rules of human conduct and the sources of the positive law enforced by the state. The spirit of investigation led to metaphysical discussions as to what the law ought to be, and not a little speculation as to the original source of authority. The philosophical spirit was strong and prevalent; the scientific method was of slower growth. Speculative theology was dominant among the educated classes in the early development of systematic law; its theories, dogmatic rules, and creeds were sacred and therefore above human authority, and by some thought to be above ordinary criticism. All human authority must, it was urged, conform to the letter of the conception and statement in creeds of divine power and divine will. The growth of the state and the increasing complexity of human affairs requiring new rules of conduct, together with a widening spirit of inquiry after truth, led to the discussion and the development of what was termed the law of nature. This phrase was at least less sacred, and opened the field of politics and law to freer discussion, and the human mind began its search after right as disclosed, in some degree at least, by human experience.

Other theories arose which need not be mentioned; speculation was everywhere seeking authority for government and sources of law outside of the human mind and will. These metaphysical studies are interesting as a part of the history and development of the subject, but time will not permit, nor does my aim require us to review them. It is sufficient and a relief to observe that in the course of human affairs some theologians and many jurists discovered the truth contained in the statement, "The letter killeth, but the spirit maketh alive." Then investigation and search after the spirit of the law — the principle within the rule, a knowledge of right — became the aim and work of some of the most profound writers. Then the scientific method began to develop, and with some to supersede the speculative spirit. The principle of a law was sought by a study of the rule, and its rightness determined by its beneficial operation in human society and its harmony with other principles embodied in other rules of conduct. These principles, as they are discovered and stated, form a body of fundamental truth pertaining to the character and operation of positive human law. The principles are not formulated rules of conduct, for they can be stated in a variety of phrases, but they are the essence of all formulated law.

Behind the manifestation of every visible thing there is the conception of it in the human mind. Is it a painting or a statue? If



so, it lived in the mind of the artist before his hand ever touched the brush or the chisel. We call this an ideal, and sometimes ideals are spoken of with derision; but ideals are as real and as essential as the things we touch and handle. Within every living organism there is the spirit or unseen force that we call the principle of life. The form remains when the spirit is gone out of it, but there is no longer a living organism. So every rule of conduct expresses more or less accurately a principle — a theory of right — and by this principle or theory the visible or formulated rule must be known and judged. The principle is the source of the rule more or less definitely fixed in the mind or minds that formed the rule, but in a much higher sense, because more clearly understood by the study and consideration of the rule and its operation, the principle becomes the measure or standard by which the rightness or wrongness of the rule is finally determined.

Architecture is a science. There may be speculation as to its origin, but we know as a matter of fact that the science grew out of the study of structures. Man ceased to be a savage when he became a carpenter; he became civilized when he became an architect. The science grew out of a study of many visible subjects, the work of men's hands. It involved the adaptation of things to some need in civilized life, right proportions and some adornment. The conceptions and principles which were the result of this study and comparison came into being; the study and the comparison of things cultured and enriched the mind, and in that unseen and mysterious workshop created new and higher ideals and conceptions, which in time were manifested in new visible forms. These principles, systematized, formed a body and made the science which became the standard by which all structures are judged. Looking at a building we inquire, Is it good architecturally? That depends upon its adaptation to the uses to which it is to be put; its ability to stand the strains that will come upon it; proper proportions and conformity in all its lines to the beautiful. We measure or determine it by the rules of the science. This same intellectual process is equally true in the domain of formulated law. Is the rule expressed in a given formula adapted to establish and maintain a right or to cure an evil? Does it fit into and become an harmonious part of the general system of law? These inquiries must be answered by applying as a test the principle which ought to govern in the particular case and which presumably it was sought to make prevalent by the formulated rule. It will be observed, therefore, that there is a study that is deeper and more far-reaching than the mere memorizing of rules. The rule is the visible sign; it may be committed to memory and mechanically applied to a condition or to conduct in human society; but the true conception of the rule and its right application in nearly

all cases arising under it require a knowledge of the conception or principle behind the formulated rule. These rules are the facts that are to be investigated, and in these, or by their aid, the principles of law are to be found and a true science established. Every science must rest upon the facts within its realm. As the facts multiply in a given sphere of human knowledge, the conceptions increase in number, and as these are fitly joined together a body of principles is created, and this constitutes a science; it may be of astronomy, or geology, or of law.

We have now reached a definition which is the modern conception of the word "jurisprudence." It is the science of law; not the body of positive laws enforced by a particular state, but the body of principles and generalizations regarding all those "relations of mankind which are generally recognized as having legal consequences."

But our definition must be defined. To say the science of law raises the question at once, What laws are included? To be scientific the field of inquiry must have reasonably clear boundaries. There are many laws. The word is sometimes misused, but we need not stop for the purposes of this definition to notice these inaccuracies. We have spoken of the divine law, the natural law, and we may now add the moral law and the laws of polite society. Are these within the field of investigation and study in constructing this science? They are in themselves important, but they certainly do not fall within the meaning of the word "law" as used in our definition. It is difficult to formulate a definition exactly covering the field of inquiry, and excluding that which belongs in the field of pure philosophy or metaphysics. Take that old definition, law is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong" — a very good one for some purposes, assuming that all laws are prescribed and are commands of the state; but there are rules of conduct to be studied which cannot be called commands of the state. If we say all laws are commands determining what is right and prohibiting what is wrong, we shall find ourselves limited to public law, statutory law, and judicial determination. This definition, therefore, is too narrow.

The moral law and what are termed the laws of polite society are certainly worthy of study and are to be observed; but these laws do not fall within our definition.

I do not say that an understanding of what is termed ethics is not necessary for the student of the science of law; it is important; without it the reasoning of the scholar will be quite wanting in essential quality and strength. But these laws fall within another science and do not come within our definition. Like most of the principles

of science, this word "law" may be defined in a variety of ways, and taken together these definitions may include all that is to be considered; but it seems preferable to have some fixed guide outside the wording of a rule; therefore, adding international law, I like the definition of Sir Frederick Pollock, who says law is "the sum of those rules of conduct which courts of justice enforce, the conditions on which they become applicable, and the manner and consequence of their application." This refers us to the jurisdiction of courts.

I do not say that in determining the principles contained in the rules of conduct to be studied we may not call to our aid as tests rules and recognized principles that lie outside of this definition. What I claim is that to constitute the science of law, as the phrase is here used, it must be a system or group of principles which pertain to and should be embodied in the rules coming within this definition of law. To determine whether a given rule comes within the general definition quoted, we have only to inquire whether it be, first, an international law recognized by the civilized nations of the earth, a principle which dominates states in their intercourse with each other; or, second, whether it be a rule which the courts of justice of a civilized nation enforce, or follow in determining the conditions on which the substantive law becomes applicable, and the manner and consequence of its application. This includes the whole field of the judicial and professional action of judges and lawyers.

Having limited the science to the laws falling within this jurisdiction, we may now say that the first and highest conception of jurisprudence is, that it is the knowledge of a body of principles co-ordinated and systematized, pertaining to the fundamental laws which states and the courts of states recognize and enforce in determining the conduct of a state in its dealing with other states, the privileges of citizens temporarily within foreign territory, the relations and obligations of inhabitants to the state, and the relations of these inhabitants with each other.

This conception gives a well-defined field to jurisprudence. It is not the "study of law" as that phrase is usually and properly understood, meaning the study of formulated law stated in maxims, constitutions, statutes, opinions, and decrees of court, but it is the field which in a sense lies back of all this; it is the body of principles, the spirit of the law, which enlightened authority will seek to embody in the visible formula.

And now let me ask whether there is not another meaning, secondary it is true, that may properly be given to this word "jurisprudence." It is a science; may it not also be called an art? The proper application of a science to the construction of visible things is something more than the putting together of material. A carpenter can build a house, but only an architect can apply the princi-

ples of the science of architecture in the building of a house. The carpenter and the architect in common use stone, brick, mortar, and wood; the structure made by the carpenter may be strong and may serve as a shelter from the storm; but the architect puts some things into his building which are not material. We call this adaptation to a particular use; proper proportion, adornment. The one has a knowledge of a body of principles which the other does not possess. This knowledge is science. The application of it in the construction of a building is an art. Is there an art in formulating law for the conduct of peoples? A tyro may put together words and create a law. It will have authority, and may chance to express some true principle of government, but it will not have proper limitations; it may disregard conditions; it may destroy or impair the operation of other principles of equal value, or create the very evil it seeks to destroy.

Suppose a legislature, impelled by some sentimental reason, exercising its political and legislative power, should undertake to determine the primary evidence of a contract in an action thereon between principal and agent, and should enact that the paper containing the order to which the principal affixed his name with his own hand should be the best evidence of the authority given. This would give expression to a very sound principle, for is not my letter to my agent the true and best evidence of what he is to do for me? But what about orders by telegraph under such a statute? This great agency of commerce is overlooked. The agent will not act upon the message delivered to him, for it is not the best evidence of his authority under such a statute. Wise jurists have worked the problem out differently in the best interest of trade by making the dispatch delivered and to be acted upon the best evidence. Under a statute such as we have supposed, the use of one of the greatest facilities of commerce would be practically destroyed, while under the rule formulated by the jurists the telegraph has become an efficient factor in modern business.

Again, a legislative body determines in its legislative capacity that it will prevent the formation of industrial "trusts" and passes an act declaring all contracts, combinations in the form of trusts or otherwise in restraint of trade, void, and the persons making them guilty of a misdemeanor; now, suppose that the common carriers, the railroads, to protect themselves against the demands of powerful corporations for special rates and privileges, enter into contracts fixing a fair rate to be charged all shippers alike, and providing heavy penalties to be paid by the company violating the contract. A case comes before the proper tribunal involving the contract between the railroad companies, and this act by its wording is declared to apply not only to the trusts but also to the railroads — these quasi-



public corporations carrying on the business of transportation — and the railroad contracts are declared void. Thereupon a great corporation, which the legislature so much feared, now demands special rates and privileges over the public highways; it insists upon lower rates and better services than are accorded to its competitors in order that by such favoritism it may crush out competition and secure a monopoly. It sends millions of tons of freight, and the manager of every line of railroad is anxious to get the business. Will the manager yield to the demand and give the special rate to get the business? Will he give better rates and facilities than his competitor across the way in order to secure the traffic of this producer and shipper of enormous quantities? It is competition, and that is what the legislature wanted. There is now no mutual contract between these quasi-public servants, with penalties attending the violation of the agreement, to prevent acceding to the demand. The special rate will be given and the industrial trust which this legislation sought to curb thrives under the law. The great corporations could hardly have done better for themselves had they formulated the statute.

All who formulate law, be they legislators or jurists, must use words; but the jurist, having a knowledge of the science of law, will put into his formula limitations which will recognize existing agencies and conditions in society, and while he gives force to the principle invoked he will not allow its operation, through the careless wording of the rule, to destroy or impair the operation of other principles of equal value. He has a knowledge of the science of law and formulates his rule according to its principles, using words covering all the conditions and principles involved. This is the use of the science; the application of the science; the *ART* of jurisprudence.

We may next inquire whether it is proper to affix any territorial limits to the investigation. In other words, can there be a jurisprudence of a particular state? Is it proper to speak of the jurisprudence of England, or of France, or of Germany, or of any other nation? Can there be more than one science of law? We must recognize that there is a diversity in the forms of government which formulate and enforce rules of conduct. Peoples differ in language, pursuits, knowledge, and many of the things embraced within the word "civilization." May there not, therefore, be a principle good for one nation, which is error, or at least half truth, for another nation?

Take the two great systems, — the Roman law and the English common law. The Roman, at least as finally codified, was the product of cultured minds selecting and creating rules according to their best judgment of right and expediency. On the other hand, the common law was the product of the people adjusting themselves

to community life, and in the adjustment contending, one class insisting upon a certain rule of conduct and another class claiming another rule with reference to a particular matter; neither party obtained what it claimed, but they agreed at last upon a rule that should be observed by both. A common practice was thus established, which in time was recognized and enforced by the courts and became a common law. For illustration, the feudal lord demanded unlimited service from his vassal with undefined rights in the land, and the vassal made like demands upon those under him. The sturdy Saxon, loving definiteness, demanded that the amount of service which he was to render to his overlord should be defined and for that service he should have a particular interest in the soil. Out of these controversies, extending through years of time, there came at last a complex system of real-estate law, with its multitudinous tenements and rights. Again, the king contended for absolute sovereignty; the lords and their followers asked for certain liberties and rules of conduct, to be obeyed not only by the people, but by the king himself. There was stubborn contention, and out of it came the English constitution. These differences in origin between the two great systems would certainly give the greatest opportunity for two sciences of law. But can it be said that the fundamental principles of right which control those relations of men, generally recognized as having legal consequences, are so very different in the two systems? There may be a difference of theory, difference of application, possibly a difference of condition upon which the law becomes applicable, but, so far as substantive right is concerned, there is remarkable similarity in the two systems.

Doctor Holland, in his admirable work upon jurisprudence, says: "A science of law might undoubtedly be constructed from a knowledge of the law of England alone, as a science of geology might be, and in great part was, constructed from an observation of the strata in England only; yet as there is no particular science of geology, so neither is there a particular science of law. For a science is a system of generalizations which, though they may be derived from observations extending over a limited area, will nevertheless hold good everywhere; assuming the object-matter of the science to possess everywhere the same characteristics." It is true, as again stated, that "the wider the field of observation, the greater, of course, will be the chance of the principles of a science being rightly and completely enunciated; but, so far as they are scientific truths at all, they are always general and of universal application."

After careful study of the subject, the foregoing position taken by this distinguished author seems to be correct in speaking of jurisprudence as a science. We shall find, as the science of law develops, that the tendency will be to a clear statement and co-

ordination of principles which will be of universal application, and this will tend to the unity of the spirit of the law in all civilized nations, and the result will be of world-wide benefit to mankind.

As to the art of applying the science — my second definition — a different use of the word may be permitted. In America the formulation of statutory law is performed by the legislator chosen from political considerations and not because of juristic attainment; in England, having determined that a law shall be formulated, the work of doing this is turned over to lawyers. Again, in America the judge or member of the court formulates the opinion of the court and it is published without change; in England, a distinguished jurist edits the opinions, or quite often formulates in writing the opinion delivered orally by the court. In other countries there are other variations in practice. I do not say which system is the best; I simply note the difference in the method of applying the science in the business of formulating law. In painting there is a science made up of generalizations regarding color, shading, perspective, but in the application of these universal principles in putting a picture upon the canvas, there are differences which constitute schools of art, as the French, the Flemish, and others; so when jurisprudence is spoken of as an art we may, I think, properly speak of the English, the French, the German, or the American jurisprudence.

Having now defined our definition, we may next inquire as to the best methods of obtaining the principles which go to make up and which form the body of this science. First, there is the metaphysical method — the attempt to arrive at these conceptions by pure philosophy or reasoning. This method begins with the divine law, or the law of nature, so called, and traverses the field of ethical study, reaching certain conclusions; it is largely speculative, in that it does not rest upon experience as a test of its rightness; it is theory, not practice, that forms the basis of this method. The theory of the structure of the earth and of the heavens was at one time determined in this way, but it is found that more accurate and correct results are reached from the study and observation of strata of earth and rock. It was a better astronomy that came from careful observation of the motion of the planets. Safer conclusions are reached in all sciences by the study of simple known facts; things visible to the eye; matter which can be touched and handled; practices which can be investigated. So we have learned to arrive at the true principles of law by studying actual rules of conduct which are or have been enforced by courts of justice. Each rule is considered not as a perfect rule, but as an attempt to establish some right; to prevent some evil in society; to confer a remedy. Analyzing the rule and noting its operation in human relations and conditions, it has been discovered that it had a certain amount of truth,

and that in certain particulars it failed to attain the purposes intended. Like the lines which the surveyor first runs, which are not expected to be right, they are studied in order to find out how far wrong they are and thus determine where right lies. Thus fundamental principles or generalizations are reached which are derived from and rest upon human experience in the administration of states. The study of the rule itself, its applicability, and its operation are the only facts from which we may determine at last the true principle which ought to govern in a particular case.

All law, wherever administered, has a certain object in view. Generally speaking, it is the well-being of society; the greatest possible freedom of action to the law-abiding; the establishment and clear definition of rights and obligations; the righting of wrongs — all in the interest of the peace and the integrity of the community. Does a given law tend toward these results in any particular, as shown by its operation in any state? If so, we may assume that there is in it a true principle which may be taken into the account.

We are not only to discover principles, but the operation of each must be clearly observed in order to put it in right relations with others, and thus form an harmonious system. Every principle has its limitations; it cannot work independently. For example, the rule that all law shall be equally applied to every person within the state is good, but the moment we undertake to apply this principle we find that its operation is limited by what is called the status of persons. It applies with all its force to persons of normal status, but must be suspended to some extent where the status of the individual is abnormal, as, for instance, where he is a lunatic or an infant. Other principles must be taken into consideration in determining the rights or the protection which should be extended to these persons occupying an abnormal status. Conditions also change the operation of law. Take, for illustration, the rule that certain contracts in restraint of trade are against public policy and void. Under the old and simple conditions of business and the very limited territory of competition, the rule needed very little safeguarding, but with the modern development of trade and commerce, the introduction of steam, the extension of territory, and the growth of population, the word "reasonable" must be introduced and defined and given its proper force and effect in applying this rule. Not all contracts in restraint of trade are void, but only those contracts which are an unreasonable restraint of trade.

The method, therefore, must be the historical investigation of formulated law, a careful analysis of each rule, with close observation of its operation and of the ever-changing conditions of society. This method will give us the true foundation for generalization and an harmonious system.



The comparative study of law is of the greatest importance, for in the wider observation of law and of its operation under varying social conditions, the better and sounder will be the conclusions reached.

This science will never become fixed and determined; it is necessarily progressive. Conditions of life are continually changing, and laws must be modified and changed to meet the new conditions. There are certain great principles governing the relations of mankind which will always remain the same, but in their application the formulated rule will have to be changed to meet the growing and developing life of man.

The science is adaptable, easy of administration, for it is not bound by any mere verbal statement; here the spirit, not the letter, of the law prevails. The formulated rule may need revision, but a system made up of true principles, all in right relation to each other, will meet changes in social, industrial, and economic conditions in any state, and form the basis and right standard for rules of conduct in every nation. The world may not realize the dream of the poet for the federation of man under one universal government, nor may we expect, under varying forms of government and different methods of applying the science, a uniformity in formulated rules, but it is not unreasonable to hope that in the development of jurisprudence as a universal science there will come a unity of the spirit of the law throughout the civilized world.



# JURISPRUDENCE: ITS DEVELOPMENT DURING THE PAST CENTURY

BY JOSEPH HENRY BEALE, JR.

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## I. *Introduction*

THE term "jurisprudence" has been used with so many meanings and each meaning is so vague, that it is necessary at the outset of any discussion of it to limit in some way the meaning intended to be put upon it. By jurisprudence, as used in the programme of this Congress, I understand to be meant the whole body of law of the European and American nations, regarded as a philosophical system or systems; in short, the science of justice, as practiced in civilized nations. My own topic, therefore, is to describe the changes in the law or in the understanding of law in the civilized world during the past century.

So broad a subject cannot, of course, be treated exhaustively nor can any part of it be examined in detail. My effort will be merely to suggest, in case of a few branches of law where the changes seem to be typical, the course and reason of the changes.

## II. *General Description of the Amount of Change*

If we compare the condition of the law at the beginning of the century with its present condition, we shall gain some idea of the amount of change in the law itself and its administration. In England conservatism and privilege and the dread inspired in the heart of the people by the excesses of the French Revolution conspired to retain in the law the medieval subtleties and crudities, though the reason of them had been forgotten and the true application of them often mistaken. The criminal law was administered with ferocity tempered by ignorance; all the anomalies and mistakes which have disfigured its logical perfection are traceable to the period just before the beginning of the last century. Criminal procedure was still crude and cruel. The accused could neither testify nor be assisted by counsel; death was the legal, a small fine or at most transportation the actual, punishment for most seri-

ous offenses. The amount of crime in proportion to the population was enormously greater than now; there were no preventive measures, no police, not even street lights. The law of torts occupied almost as small a place as it did in the proposed codes; the law of contracts was so unformed that it was not certain whether Lord Mansfield's doctrine that a written commercial agreement needed no consideration would prevail or not. Business corporations were hardly known; almost the whole field of equity was hidden by a portentous cloud. Lord Eldon had just become chancellor. What the law of England was, such with little difference was the law of our own country. Its application to the complex life of the present was not dreamed of; and it must be greatly changed before it could be adapted to the needs of the present. Yet to say of it, as did Bentham, that it was rotten to the core and incapable of amendment, was grotesquely incorrect; to say as one of his latest disciples did that it was the laughing-stock of the Continental nations is strangely to misread history. In 1803, with all its imperfections and crudities, it was probably the most just and humane system of law under which human beings were then living.

On the Continent, feudal rights characterized civil law; torture was the basis of the administration of criminal law. And in no country of any size had the people yet obtained what had been given to Englishmen by their greatest king more than six hundred years before,—a common law. Each province throughout southern and western Europe had its custom, each land-owner his own jurisdiction. The rigor of the criminal law had been somewhat modified in France by the legislation of the Revolution, and just at the beginning of our century the Civil Code, first of the French codes, was adopted. These codes, temporarily or permanently impressed on a large part of Europe outside of France, constituted the beginning of modern legislative reform.

### III. *General Direction of Change*

The spirit of the time molds and shapes its law, as it molds and shapes its manner of thought and the whole current of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man's conception of right changes from age to age, as his knowledge grows. The spirit of the age, therefore, affecting as it must man's conception of right, affects the growth both of the common law and of the statute law. But the progress toward ideal right is not along a straight line. The storms of ignorance and passion blow strong against it; and the ship of progress must beat against the wind. Each successive tack brings us nearer the ideal; yet each seems a more or less abrupt

departure from the preceding course. The radicals of one period become the conservatives of the next, and are sure that the change is a retrogression; but the experience of the past assures us that it is progress.

Two such changes have come in the century under consideration. The eighteenth had been on the whole a self-sufficient century; the leaders of thought were usually content with the world as it was, and their ideal was a classical one. The prophets of individuality were few and little heeded. But at the end of the century, following the American and French revolutions, an abrupt change came over the prevailing current of thought throughout the civilized world; and, at the beginning of the period under discussion, the rights of man and of nations became subjects not merely of theoretical discussion, but of political action. The age became one of daring speculation. Precedent received scant consideration. The American Revolution had established the right of the common people to a voice in the government. The French Revolution had swept feudal rights from the civilized world. The French Republic was, to be sure, just passing into the French Empire; but it was an empire which belonged to the people, and one of which they were proud. The Emperor was the representative and the idol, not of an aristocracy, but of his peasants and his common soldiers. The dreams of Napoleon himself, to be sure, were not of an individualistic paradise, where each man's personality should have free play and restraint on his inclinations be reduced to the minimum; but so far as he was able to put his centralizing ideals into execution he raised but a temporary dam, which first spread the flood of liberty over all Europe and was finally swept away by the force of the current.

Starting from this point, the spirit of the time for more than a generation was humanitarian and individualistic. In political affairs independence was attempted by almost every subordinate people in the civilized world, and was attained by the South American colonies, by Greece, and by Belgium. In religion free thinking prevailed, and every creed was on the defensive. In society women and children were emancipated. Slavery was abolished and the prisons were reformed. It was rather a destructive than a constructive age, and its thinkers were iconoclasts.

But a change, beginning with the second third of the century, was gradually accomplished. The application of the forces of steam and electricity to manufacture and transportation has had a greater effect on human life and thought than any event of modern times. The enormous power exerted by these forces required great collections of labor and capital to make them effective. Association became the rule in business affairs, and as it proved effectual there, the principle of association became more and more readily accepted

in social and political affairs, until it has finally become the dominating idea of the time. The balance has swung; the men of our time are more interested in the rights of men than in the rights of man; the whole has come to be regarded as of more value than the separate parts. Beginning with the construction of railroads, the idea attained a firm standing in politics in the sixties. Whereas, before that time, the movement had been toward separation, now it was toward consolidation. People felt the tie of nationality stronger than the aspiration for individual development. The unification of Italy and of Germany, the federation of Canada, the prevalence of corporate feeling in America which, first passionately expressed by Webster, prevailed in 1865, mark the principle of association in political affairs. In business, the great combinations of capital have been the salient features of the change.

Professor Dicey, in a most suggestive series of lectures a few years ago, pointed out many ways in which the English law had been affected by this progress of thought during the nineteenth century; but since the thought of the whole world has been similarly affected we should expect to find, and we do find, that not merely English law but universal jurisprudence has developed in the direction of the progress of thought: during the first period in the direction of strengthening and preserving individual rights, both of small states and of individuals; in the second period in the direction of creating, recognizing, and regulating great combinations, whether of states or of individuals. Let us develop this line of thought by examining the progress of law in a few striking particulars.

#### IV. *International Law*

The most striking development of the law of nations during the last century has been in the direction, if I may so call it, of international constitutional law rather than of the substantive private law of nations. At the beginning of the period, the fundamental doctrine of international law was the equality of all states, great or small, and this idea, as one might expect, was fully recognized and insisted on during the first fifty years of the century. There was little development in the law otherwise. Each nation adopted and enforced its own idea of national rights, and was powerless to force its ideas upon other nations; when, at the beginning of the century, France set up her absurd notions of her own national rights, the other nations were powerless to restrain or to teach her. There was no international legislature or court; no method of declaring or of developing the law of nations. Each state was a law to itself; giving little more than lip service to a vague body of rather generally accepted principles. The alliance to conquer Napoleon, to be sure,



brought several great nations into a common undertaking, but this alliance, while of political importance, added nothing to the development of the law.

In the last half of the century, however, there has been an enormous development of combinations, both to affect and to enforce law; and resulting therefrom a development of the substance of the law itself. The associations of civilized nations to suppress the slave trade both made and enforced a new law. The concert on the Eastern Question, the Congress of Paris, the joint action of the powers in case of Greece and Crete, and in the settlement of the questions raised by the Russo-Turkish and Japanese wars, the Geneva and Hague conventions, are all proofs of the increasing readiness of the great powers to make, declare, and enforce doctrines of law, and they have not hesitated, in case of need, to make their action binding upon weaker states, disregarding, for the good of the world, the technical theory of the equality of all states. While all independent states are still free, they are not now regarded as free to become a nuisance to the world. Perhaps the most striking change in the substance of international law has been the extraordinary development of the law of neutrality. A hundred years ago the rights and the obligations of neutrals were ill defined and little enforced. To-day they form a principal theme of discussion in every war; and the neutral nations, for the good of the whole world, force the belligerents to abate somewhat from their freedom of action.

It may be worth while, in order to see how far this constitutional change has progressed, to look for a moment at the present condition of the constitutional law of nations. We have, in the first place, a body of states known as the "Great Powers," which have taken to themselves the regulation of the conduct of all nations. In this hemisphere the United States is sponsor for all the smaller independent nations. In Europe the Great Powers exercise control over the whole of Europe and Africa, and a large part of Asia, while in the extreme Orient, Japan seems likely to occupy a similar position to our own in the Western hemisphere. The constitutional position of this confederation of powers is not unlike that of the states of the American Confederation of 1780, and in certain ways it is even further developed. Its legislation is not in the hands of a single permanent congress, but it is accomplished by mutual consultation. For action, as Lord Salisbury once informed the world, "unanimous consent is required," as was the case in our confederation. Executive power has been exercised several times, either by the joint show of force by two or more powers, or by deputing one power to accomplish the desired result. The judiciary, as a result of The Hague Convention, is much further developed than was that of the Confed-

eration, even after 1781. All of this has been accomplished in fifty years, and the prospect of peace and prosperity for the whole world as a result of its further development is most promising.

### V. *Codification*

The progress that has been described is well indicated by the course of the movement for codification.

Just a hundred years ago the first of the French codes was adopted. These codes had two purposes, first to unify the law, which, before the adoption of the codes, had differed in every province and every commune of France; second, to simplify it so that every one might know the law. The first purpose appealed most strongly to lawyers and to statesmen. The second appealed to the people generally. Whatever reason weighed most with Napoleon, there is no doubt which made the codes permanent. The people of France, and of the other countries where they were introduced, hailed them as creating a law for the common people. They persisted in most countries where they had been introduced by Napoleon's arms in spite of the later change of government; whether the country on which they had been imposed was Flemish, German, Swiss, or Italian, it retained the codes after the defeat of Napoleon, and they have remained almost the sole relic of his rule, the only governmental affairs which retain his name, and, except Pan-Germanism, the only lasting monument of his labor. They persisted because they were in consonance with the individualistic feelings of the times.

Bentham urged codification on England for the same reason.

"That which we have need of (need we say it?) is a body of law, from the respective parts of which we may each of us, by reading them or hearing them read, learn, and on each occasion know, what are his rights and what his duties."

The code, in his plan, was to make every man his own lawyer; and the spirit of individualism could go no farther than that. Conservative England would not take the step which Bentham urged; but a code prepared by one of his disciples upon his principles was finally adopted (by belated action) in Dakota and California, and was acclaimed as doing away with the science of law and the need of lawyers.

The result of the adoption of the French codes and the Benthamite codes has been far from what was hoped and expected. They were to make the law certain and thus diminish litigation and avoid judge-made law. That litigation has not been diminished by codification can easily be shown by comparing the number of reported cases in the states which have adopted the codes and in states which have not adopted the codes. As a result of this comparison, we find that



France has over 15 volumes a year of reports of decisions on points of law, 4 of them containing over 2500 cases each; England has about 10 volumes a year of reports of decisions on points of law containing about 900 cases. California has from 3 to 4 volumes of reports of decisions on points of law each year, 100 since the adoption of the Code in 1871; Massachusetts has 2 to 3 volumes of reports of decisions on points of law, 76 in all during the same period. As bearing on the avoidance of judge-made law, which, by a curious ignorance one is perhaps not quite justified in calling insane, Bentham regarded as inferior to legislature-made law, the result of the codes in one or two points will be instructive. The French code provided that all actions *ex delicto* should be decided by the court as questions of fact, without appeal for error of law. Notwithstanding this provision, recourse has been had to the Court of Cassation and a system of law has been built up on judicial decisions similar in character and comparable in amount to that built up in England in the same way during the same period. There is, for instance, a French law of libel which must be learned, not from the code, but from the pages of Dalloz and the *Pandectes Françaises*, just as our law of libel must be studied in the law reports and the digests. Even if a point is apparently covered by an express provision of the code, judicial decisions may affix a meaning to the provision which can only be known to a student of law. Thus the French code appears to lay down the proposition that capacity to contract is governed by the law of the party's nation, yet the French courts refuse to apply this principle and instead of it apply the French law of capacity in each case where the other party to the agreement is a Frenchman who acted *bona fide* or where the party to be bound was commorant and doing business in France. These are two examples only out of many that might be cited of the failure of the code to fulfill the hopes of its individual sponsors. If we leave the French code and come to those in our own country, we shall find the same process going on. The law of California has been developed in much the same way since the adoption of the code as before, and the common-law decisions of other states are as freely cited by her courts as authority as if their own law had never been codified. The uncertainty and confusion caused by the adoption of the New York Code of Civil Procedure is a well-known scandal.

It is true that Bentham objected to the French code as imperfect and made upon the wrong principle, and that Field objected to the New York Code of Civil Procedure as finally adopted. These objections were most characteristic. Every codifier desires not merely a code, but his own code, and will not be satisfied with any other. Hence, it follows that no complete code can be adopted which would be satisfactory to many experts in law. Furthermore,

no codifier will be satisfied to accept the judgment of a court or any body of other men upon the meaning of his code, nor to accept the interpretation of the executive department on the proper execution of the law. It will follow that each codifier of the Benthamite type must be legislature, judge and sheriff, and the logical result (like the logical result of all individualism carried to an extreme) is anarchy.

This failure of the hope of the individualistic codifiers and the change in the spirit of the age have affected our ideal of codification. The purpose of the modern codifiers is not to state the law completely, but to unify the law of a country which at present has many systems of law, or to state the law in a more artistic way. In other words, the spirit of the modern codifiers is not individualistic, but centralizing. Thus the modern European codes of Italy, Spain, and Germany were adopted in countries where a number of different systems of law prevailed, and the purpose of codification in each state was principally to adopt one system of law for the whole country and incidentally to make the expression of the law conform to the results of legal scholarship. The same purpose is at the basis of the American Commission for the Uniformity of Legislation. The purpose of the English codifiers appears to be merely an artistic one. It cannot be better expressed than by the last great disciple of Bentham, Professor Holland. The law expressed in a code, he says, has "no greater pretensions to finality than when expressed in statutes and reported cases. Clearness, not finality, is the object of a code. It does not attempt impossibilities, for it is satisfied with presenting the law at the precise stage of elaboration at which it finds it; neither is it obstructively rigid, for deductions from the general to the particular and the competition of opposite analogies are as available for the decision of new cases under a code as under any other form in which the law may be embodied." "It defines the terminus *a quo*, the general principle from which all legal arguments must start."

"The task to which Bentham devoted the best powers of his intellect has still to be commenced. The form in which our law is expressed remains just what it was."

Such a code as he describes is really very far from the ideal of Bentham. It does not do away with judge-made law; it does not enable the individual to know the law for himself; its only claim is that it facilitates the acquisition of knowledge by the lawyer by placing his material for study in a more orderly and logical form. The cherished ideals of the reformers of a hundred years ago have been abandoned, and an ideal has been substituted which is quite in accordance with the spirit of our own times.

VI. *Individual Rights*

The most striking characteristic of the progress of jurisprudence in the first half of the century was its increasing recognition of individual rights and protection of individuals. Humanity was the watchword of legislation; liberty was its fetich. Slavery was abolished, married women were emancipated from the control of their husbands, the head of the family was deprived of many of his arbitrary powers, and the rights of dependent individuals were carefully guarded. In the administration of criminal law this is seen notably. At the beginning of the century torture prevailed in every country outside of the jurisdiction of the common law and the French codes, but torture was abolished in every civilized state during this period. Many crimes at the beginning of the century were punishable with death. Few remained so punishable at the end of fifty years. The accused acquired in reality the rights of an innocent person until he was found guilty. He could testify, he could employ counsel, and could be informed of the charge against him in language that he was able to understand; and, even after conviction, his punishment was inflicted in accordance with the dictates of humanity. Imprisonment for debt was abolished. Bankruptcy was treated as a misfortune, not a crime.

As with the emancipation of individuals, so it was with the emancipation of states. The spirit of the times favored the freedom of oppressed nations as well as of individual slaves. The whole civilized world helped the Greeks gain their independence. The American people hailed with touching unanimity the struggles of Poland and of Hungary for freedom, and even the black republics of the West Indies were loved for their name, though they had no other admirable qualities.

While there has been little actual reaction in the last half-century against this earlier development of the law in the direction of liberty, there have been few further steps in that direction. The zeal for emancipation has in fact spent its force, because freedom, quite as great as is consistent with the present state of civilization, has already been obtained. So far as there has been any change of sentiment and of law in the last generation it has been in the direction of disregarding or of limiting rights newly acquired in the earlier period. France, which secured the freedom of Italy, threatens the independence of Siam; England, which was foremost in the emancipation of the slaves, introduces coolie labor into the mines of South Africa; America, which clamored for an immediate recognition of the independence of Hungary, finds objections to recognizing the independence of Panama and refuses independence to the Philippines. In the criminal law there has been no reform, though there has been much im-

provement since 1850. Married women have obtained few further rights, principally because there were few left for them to acquire, and while we have freed our slaves, we have encouraged trade-unionism. In short, the humanitarian movement of two generations ago, which profoundly affected the law of the civilized world for fifty years, has ceased to influence the course of jurisprudence.

## VII. *Association*

The most characteristic development of the law during the last fifty years has been in the direction of business combination and association. A few great trading companies had existed in the Middle Ages; the *Hanse* merchants, the Italian, Dutch, and English companies wielded great power. They were exceptional organizations and almost all had ceased to act by 1860. The modern form of business association, the private corporation with limited liability, is a recent invention. Such corporations were created by special action of sovereign or legislature, in small though increasing numbers, all through the last century; but during the last generation every civilized country has provided general laws under which they might be formed by mere agreement of the individuals associated. Now the anonymous societies of the Continent, the joint-stock companies of England and her colonies, and the corporations of the United States, all different forms of the limited liability association for business, have engrossed the important industries of the world. Different countries are competing for the privilege of endowing these associations with legal existence. Corporations are formed in one state to act in all other states or in some one other state; or it may be anywhere in the world except in the state which gave them being; and so in the last fifty years an elaborate law of foreign corporations has grown up all over the civilized world. But the corporation is only one form of business combination which has become important. Greater combinations of capital have been formed, that is, the so-called trusts; great combinations of laboring men have been formed, the so-called unions; and the enormous power wielded by such combinations has been exercised through monopolies, strikes and boycotts. All these combinations have been formed under the law as it has been developed, and all are legal. Furthermore, the great business operations have come to depend more and more upon facilities for transportation, and great railroads and other common carriers have come to be equal factors with the trusts and the unions in the operations of modern business. The first effect, then, of the ideals of the present age upon the law is its development in the direction of forming great commercial associations into legal entities wielding enormous commercial power.



If such associations had been formed seventy-five years ago, the spirit of the age would have left them free to act as they pleased. Freedom from restraint being the spirit of the times, it would have been thought unwise to restrain that freedom in the case of a powerful monopoly as much as in the case of a poor slave. But at the present time we are more anxious for the public welfare than for the welfare of any individual, even of so powerful a one as a labor union or a trust, and in accordance with the genius of our age the law has developed and is now developing in the direction of restraint upon the freedom of action of these great combinations, so far as such restraint is necessary to serve the public interest. For centuries innkeepers and carriers have been subject to such control, though little restraint was in fact exercised until within the last fifty years. To-day the law not only requires every public service company to refrain from discrimination and from aggrandizing itself at the expense of the public, but the trusts and the unions also are similarly restricted. The principle of freedom of action, the courts in all questions now agree, rests upon the doctrine that the interests of the public are best subserved thereby, and applies only so far as that is true. When freedom of action is injurious to the public, it not only may be but it must be restrained in the public interest. That is the spirit of our age and that is the present position of the law when face to face with combinations such as have been created in the last generation. An interesting example of restriction is that almost universally placed upon foreign corporations; in the competition of certain states for the privilege of issuing charters, great powers and privileges have been conferred, which were regarded as against the public policy of the states in which the corporations desired to act. Strict regulations for the action of such corporations have resulted, imposed in the European countries usually by treaty, in England and America by statute.

#### VIII. *Scientific Study of Law*

A summary of the history of jurisprudence in the last hundred years would be incomplete without a consideration of legal scholarship during the period, and of the results of the scientific study of law. The reformers of a hundred years ago were profoundly indifferent to the history of law. Bentham, the founder of so-called analytic jurisprudence, wished not to understand the existing law, but to abolish it, root and branch, and to build a new system, the principles of which should be arrived at merely by deductive reasoning. It seems to us now almost impossible that such a man should have believed himself more capable of framing a practicable and just system of law than all his wise predecessors, but Bentham

was a marvel of egotism and self-conceit, and his reasoning powers were far from sound. He seems to have been incapable of understanding the nature of law. "If," he said, "we ask who it is that the common law has been made by, we learn to our inexpressible surprise that it has been made by nobody; that it is not made by King, Lords and Commons, nor by anybody else; that the words of it are not to be found anywhere; that, in short, it has no existence; it is a mere fiction; and that to speak of it as having any existence is what no man can do without giving currency to an imposture." Employing the same reasoning he would have concluded that justice, not being made by King, Lords or Commons, nor by anybody else, had no existence; that truth, since the words of it are not to be found anywhere, is a mere fiction. But these defects are too often found in reformers. The humanitarian age brought enormous benefits to the world, but its ideas were often ignorant, crude, and impracticable, and needed to be modified by the better instructed minds of the present constructive age. While Bentham was at the height of his power, the historical school of jurists in Germany was beginning its great work. Savigny was already preaching the necessity of understanding the history of law before it was reformed. Mittermaier and Brunner were to follow and carry on the work of the master. The unity of the past and present, and the need of conforming the law of a people to its needs were among their fundamental principles. Bentham had said, "If a foreigner can make a better code than an Englishman, we should adopt it." Savigny said, with greater truth and knowledge of human nature, that "no system of law, however theoretically good, could be successfully imposed upon a people which had not by its past experience become prepared for it."

The impulse given to legal study by the work of Savigny and his school has in the last generation spread over the civilized world and profoundly influenced its legal thought. The Italians, the natural lawyers of the world, have increased their power by adopting his principles. In England a small but important school of legal thinkers have followed the historical method, and in the United States it has obtained a powerful hold. The spirit of the age here too has supported it. We are living in an age of scientific scholarship. We have abandoned the subjective and inductive philosophy of the Middle Ages, and we learn from scientific observation, and from historical discovery. The newly accepted principles of observation and induction, applied to the law, have given us a generation of legal scholars for the first time since the modern world began; and the work of these scholars has at last made possible the intelligent statement of the principles of law.





## SECTION A — INTERNATIONAL LAW



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(Hall 14, September 22, 10 a. m.)

CHAIRMAN: PROFESSOR JAMES B. SCOTT, Columbia University.

SPEAKERS: PROFESSOR HENRI LA FONTAINE, Member of the Senate, Brussels, Belgium.

PROFESSOR CHARLES NOBLE GREGORY, University of Iowa.

COUNT ALBERT APPONYI, Hungary.

SECRETARY: ASSISTANT PROFESSOR WILLIAM C. DENNIS, Leland Stanford Jr. University.

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### THE LEGAL NATURE OF INTERNATIONAL LAW <sup>1</sup>

BY JAMES BROWN SCOTT, A.M., J.U.D. <sup>2</sup>

ASSEMBLED as we are to discuss various phases of international law, we naturally assume its existence, and we need no argument to convince us that as international law has the force of law, it is and must be law. To state the case is to prove it; yet the legal nature of international law has been seriously questioned and denied by a few Continental jurists and by the analytical school of English jurisprudence.

The law of nations, it is insisted, cannot be law in the technical sense, for law is a rule of civil conduct prescribed and enforced by a superior. The rule of law contemplated in the definition must, it is said, be certain, precise, and universal in its application within the given jurisdiction. Tried by this standard, even municipal law fails, because it is anything but certain and precise except in rare instances. The existence of courts of appeal negatives the idea of certainty and precision. If it be admitted that the law of nations is still less certain, is less precise, that means only that international law is less perfect than municipal law, but imperfect law is nevertheless law. The universality of international law appears from its name, and the common law of nations is a fact, not a phrase or myth.

In the next place, even admitting the existence of an ill-defined law of nations, still there is, it is said, no supreme court of nations

<sup>1</sup> The Chairman of this Section, Professor James Brown Scott, of Columbia University (recently appointed Solicitor for the Department of State, Washington), opened the proceedings by an introductory address so comprehensive and so valuable to the general treatment of the subject, and so in keeping with the theory underlying the sectional work of our Congress, that it is reprinted in full.

<sup>2</sup> For a more elaborate treatment of the same subject, see two articles by the present writer in the *Columbia Law Review* for June, 1904, and February, 1905.

or international tribunal in which it can be enforced, as is the case with municipal law. If we point to The Hague as a partial refutation of the objection, the immediate and triumphant reply is that the international sheriff is lacking or powerless to execute the judgment, and necessarily so, for is not the law of nations based upon the equality of states? It is evident, therefore, that neither superior nor inferior can exist. There is doubtless much in this criticism, but in fact as well as in theory international law does exist and is accepted, applied, and observed in its entirety by all civilized nations in their constant and common intercourse. We may readily admit that force may be necessary to cause the observance of municipal law; but if we find international law observed as a whole we must presume that a sanction lies back of it, whether it be physical or moral force, or the force of public opinion. The compelling force is, in any case, a sufficient and satisfactory sanction.

Nor is this the dream of the enthusiast; it is the sober claim of the patient and unemotional jurist. To quote von Savigny: "There may be developed among different peoples a community of legal consciousness analogous to that created in a single people by positive law. The foundation of this intellectual community is constituted partly by a community of race, but principally by a community of religious belief. Such is the basis of international law, which obtains principally among the Christian and European states, but which was not unknown to the peoples of antiquity, as is evident by the Roman *Jus feciale*. This law we may consider as positive law, although it is not yet a completed legal system." (*System des Heutigen Römischen Rechts* (1840), vol. 1, sec. 11.) To which may be added the statement of one hardly less distinguished, Von Jhering, who states his opinion unhesitatingly and unequivocally in a single sentence: "The legal nature of international law cannot be doubted." (*Zweck im Recht* (1877), vol. 1, p. 223.)

If we reject the testimony of the civilian and question the international lawyer, the answer is equally positive and convincing. For example, the late Professor Rivier thus expressed the prevailing view of Continental specialists: "The law of nations, founded not upon simple abstractions, but upon facts, is a system of positive law. Its principles are veritable legal principles, recognized as such and consequently as binding by the common conscience of the states forming the family of nations." (*Droit de Gens*, vol. 1, p. 18.)

If we turn now from the Continent to the English-speaking world, the answer is indeed even more positive, if less reasoned and philosophical. In England, international law has been declared by



the highest authorities known to the law to be a part of the municipal or common law of the realm. In the case of *Triquet v. Bath* (1764), 3 Burr. 1478, Lord Mansfield, in commenting upon the case of *Buvot v. Barbut* (1736). Talbot's Cases, 281, tried before Lord Talbot, said: "Lord Talbot declared a clear opinion: 'That the law of nations, in its full extent, was part of the law of England. . . . That the law of nations was to be collected from the practice of different nations, and the authority of writers.' Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Brinkershoeck, Wiquefort, etc., there being no English writer of eminence upon the subject. I was counsel in the case, and have a full note of it." His Lordship also remarked: "I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador." When it is noted that Messrs. Blackstone, Thurlow, and Dunning appeared for the plaintiff, it is at once evident that the case was carefully argued, thus giving additional weight to the measured judgment of the court. Three years later, in *Heathfield v. Chilton* (1767), 4 Burr. 2015, the same learned judge said: "The privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England. And the Act of Parliament of 7 Anne, chap. 12 [concerning the immunities of diplomatic agents], did not intend to alter, nor can alter, the law of nations."<sup>1</sup>

And in Blackstone's *Commentaries*, published in the four years from 1765 to 1769, the learned commentator, who had been of counsel in *Triquet v. Bath*, and, therefore, spoke with peculiar knowledge and authority, said: "The law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted to its full extent by the common law, and is held to be a part of the law of the land. And those Acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitution of the kingdom, without which it must cease to be a part of the civilized world."<sup>2</sup> (*Commentaries*, bk. iv, chap. 5, p. 67.)

<sup>1</sup> The language of our own Supreme Court is in point: "Sections 4062, 4063, 4064, and 4065 were originally sections 25, 26, 27, and 28 of the Crimes Act of April 30, 1570, chap. 9, 1 Stat. 118; and these were drawn from the statute of Anne, chap. 12, which was declaratory of the law of nations, which Lord Mansfield observed in *Heathfield v. Chilton*, 4 Burrow, 2015, 2016, did not intend to alter, and could not alter." Per Fuller, C. J., in *Re Baiz* (1889), 135 U. S. 403, 420.

<sup>2</sup> It may not be without interest to note that Sir Robert Phillimore, likewise commentator and judge of wide experience, says briefly in confirmation of

And such is the language of the law courts in the Great Britain of to-day, although the contrary was held by a majority of one in *Regina v. Keyn* (1876), L. R. 2 Ex. Div. 63. To overrule this decision and make the laws of England conform to the law of nations, the declaratory Act of 41 and 42 Vict. chap. 73 was passed within two years of this discredited and universally criticised judgment. The important part of the Act for the purposes of this article is as follows: "The territorial waters of her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of her Majesty." The preamble declares that "the rightful jurisdiction of her Majesty . . . extends and has always extended" over such bodies of water.

Or to quote the language of Sir Henry Maine: "In one celebrated case [*Regina v. Keyn*], only the other day, the English judges, though by a majority of one only, founded their decision on a very different principle, and a special Act of Parliament was required to reëstablish the authority of international law on the footing on which the rest of the world had placed it." (*International Law*, pp. 38 *et seq.*)

But the matter does not rest here, for in the year of grace, 1905, an English court has had occasion to consider carefully the nature and relation of the law of nations to the law of England. The various decisions of Lords Talbot and Mansfield in *Buvot v. Barbut*, *Triquet v. Bath*, *Heathfield v. Chilton*, were referred to and followed as correct and, therefore, binding expositions of the law.

The far-reaching importance of the case makes it advisable to state in some detail the facts as well as the opinion of the court in *West Rand Central Gold Mining Company v. The King* (1905), L. R. 2 K. B. 391. It appeared that, within the month preceding the outbreak of the war between the South African Republic and Great Britain, certain officials, acting on behalf of the Transvaal Government, seized a quantity of gold, the product of the plaintiff's mine, and it further appeared as a matter of law that the Transvaal Government was liable to return the gold or its value to the plaintiff.

The counsel for plaintiff based the right to recover upon three grounds: first, that by international law the sovereign of a con-

Blackstone: "In England it has always been considered as a part of the law of the land." (*Commentaries on International Law*, vol. 1, p. 78.)

And the late Mr. Joel P. Bishop cites this very passage as representing the law in his own as well as Blackstone's day. "Governments," Mr. Bishop says, "like individuals, cannot exist together without law to regulate their mutual relations; hence the law of nations. It is in truth common law (4 Bl. Com.); or, rather, the common law has appropriated the law of nations, making it a part of itself." (1 *New Crim. Law*, 8th ed. (1892), sec. 483.)

quering state is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered state, must be protected and can be enforced by the municipal courts of the conquering state.

Inasmuch as the court took jurisdiction of the case, it is evident, therefore, that both the nature and status of international law were necessarily involved, as well as its binding effect upon British courts of justice.

A portion of the opinion of Lord Chief Justice Alverstone, well known as Sir Richard Webster to international tribunals, follows: "The second proposition urged, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of International Law and Arbitration: 'What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another.' In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term 'International Law' is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with, and, indeed, well illustrate, our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance,

Barbuit's Case, Cas. t. Tal. 281; *Triquet v. Bath*, 3 Burr. 1478, and *Heathfield v. Chilton*, 4 Burr. 2016, are cases in which the courts of law have recognized and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her courts. The cases of *Wolff v. Oxholm*, 6 M. & S. 92; 18 R. R. 313, and *Rex v. Keyn*, 2 Ex. D. 63, are only illustrations of the same rule, namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law."

If we now consider the status of international law in the United States, we shall find the American in strict accord with the English doctrine. The first craft that carried an English settler to the New World was freighted with the common law, of which, as we have seen, the law of nations was and is an integral part. Revolution might and did repudiate British sovereignty, but the common law as the measure of individual rights and liabilities withstood the storm and stress of agitation. The nation was born into the family of nations and promptly professed obedience to the law of nations "according to the general usages of Europe." (*Ordinance of 1781, Journals of Congress*, VII, 185; 1 *Kent's Commentaries*, p. 1.) Upon the permanent organization of the government, international law was recognized in the Constitution as in the Ordinance of the Revolutionary Congress. In Article I, Section 8, Congress is specifically empowered to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Now technical words and expressions used in the Constitution, and borrowed from the English system of jurisprudence, such as the common law, equity, admiralty, the law of nations, are to be understood and interpreted as in the system from which they are borrowed, for which no authority need be cited. Were not this so, the time-honored system of trial by jury would not be our heritage as it is that of our ancestors across the water. For as Mr. Justice Harlan well says: "It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England



at the time of the adoption of that instrument." *Thompson v. Utah* (1898), 170 U. S. 343.

The law of nations was not something newly created by this clause of the Constitution; it is recognized as existent, to determine whose nature and extent resort must be had to English jurisprudence.

The English cases previously cited and the paragraph quoted from Blackstone show, it is believed, that international law was a part of the common law. As, therefore, the lawyers who framed the provisions of the Constitution were trained in the common law, and were familiar with its principles from a careful study of the *Commentaries*, it is impossible to consider the law of nations other than as a part of the common law of England, and by the Constitution of the United States it is, therefore, a fundamental and integral part of our jurisprudence.

But there is another not less potent argument for this view. Congress is given power to punish offenses against the law of nations. The law of nations is thus contemplated as an existing system and part of our municipal law. Else why is Congress given power to punish the violation? For it is elementary that nations do not, as a rule, punish breaches of foreign law. Infractions of the municipal code are a sufficient tax for judge and legislature. It is likewise elementary that Congress may indeed vary the law of nations in so far as our citizens are concerned, and that the courts would be compelled to give effect to the statute; but it is equally clear that the Act of Congress in such cases would be construed with evident reluctance and great strictness.

Even before the formation of the present Constitution, the Federal Court of Appeals admitted, in a single and well-chosen phrase, the superiority of international over municipal law: "The municipal laws of a country cannot change the law of nations so as to bind the subjects of another nation." (The *Resolution*, 1781, 2 Dallas, 1, 4.) But, if nations may not alter international law, they may, by their municipal law, according to Chief Justice M'Kean, in the case of *Ross v. Rittenhouse* (1792), 2 Dallas, 160, 162, "facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered."

If that be the measure of municipal power, it follows that any attempt to enlarge the boundaries of municipal at the expense of international law will be regarded with suspicion. Thus, in the case of *The Charming Betsy* (1804), 2 Cr. 64, 118, Mr. Chief Justice Marshall said: "It has also been observed that an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can



never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."

And in *The Nereide* (1815), 9 Cr. 388, 423, the same eminent authority said: "Till such an Act [of Congress] be passed, the court is bound by the law of nations, which is a part of the law of the land."

And as Mr. Bishop has gravely and impressively expressed it: "Doubtless if the legislature, by words admitting of no interpretation, commands a court to violate the law of nations, the judges have no alternative but to obey. Yet no statutes have ever been framed in form thus conclusive; and if a case is *prima facie* within the legislative words, still a court will not take the jurisdiction should the law of nations forbid." Again: "All statutes are to be construed in connection with one another, with the common law, with the Constitution, and with the law of nations." (*Criminal Law*, 7th ed., 60, 69. See also 8th ed., sec. 124.)

If the matter rested here, the true construction of this fundamental passage might well be in doubt, but the courts have passed upon it and its meaning in numerous cases. The binding effect of international law has been held in a variety of cases from the institution of our federal courts to the present day, and there is not a well-considered case to be found in the books that declares international law to be other than municipal law of the United States. An early and carefully considered case is *United States v. Smith* (1820), 5 Wheat. 153, in which the Supreme Court held, per Story, J., that an Act of Congress of 1819, referring to the law of nations for the crime of piracy, is a constitutional exercise of the power of Congress to define and punish that crime; and that the crime of piracy is defined by the law of nations with reasonable certainty. In the Act of Congress referred to, the act of piracy *as defined by the law of nations* was held sufficient without further definition because international law is part of our municipal law.

In the case of *The Scotia* (1871), 14 Wall. 170, Strong, J., held that our courts take judicial notice of international law. "Foreign municipal laws," he says, "must be proved as facts, but it is not so with the law of nations."

But a more recent and by much the most authoritative case on the subject is the *Paquete Habana v. United States* (1899), 175 U. S. 677, in which the late Mr. Justice Gray of the Supreme Court squarely held the doctrines advanced by Lords Talbot, Hardwicke, Mansfield, and Sir William Blackstone, and incorporated in numerous decisions of the august tribunal of which he was a member. The case arose out of a capture in the recent Spanish-American war of two Spanish boats, the *Paquete Habana* and the *Lola*. The question before the courts was, Are fishing smacks in the absence of municipal

law or treaty protected from capture by the law of nations, and is such a law of nations part of the municipal law of the United States? In deciding the first question in the affirmative, the learned Justice said: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

In this remarkable opinion, not only is international law held to be law in the legal sense of the word, but the sources of that international law binding upon our courts are sketched with a masterly hand. It is submitted that this case settles the question for an American lawyer as fully and clearly as a decision of a court of final resort can ever settle a matter properly before it, namely, that international law is law; that it is part of our municipal law; that our courts take judicial notice of it as such.

The conclusion, therefore, is irresistible, whether the point of approach be the reason and philosophy of the civilian, the theory of the international specialist, or the practical standpoint of the bench and bar, that international law is law and as such binding upon nation and citizen alike.

# THE PRESENT AND FUTURE STATE OF INTERNATIONAL LAW

BY HENRI LA FONTAINE

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THE legal needs of men are modified in the course of centuries, as are their material and intellectual needs. Laws have been multiplied like products and works, and out of primitive, shapeless, and chaotic custom have sprung successively all the legal categories, the law of private rights, the law of commerce, admiralty law, constitutional law, administrative law, penal law, industrial law.

The easy communications, the universal exchange of merchandise, the very recent organization of the world market, have almost suddenly given to the category which entered last the legal domain, to international law, a considerable and dominating importance. Internationalism is now ubiquitous; it is becoming difficult to undertake an enterprise or create an institution, the expansion of which will not perforce be international, and that word has henceforth conquered such favor that it is applied to the least international matters. Law is fated to follow the general evolution. It is the plastic armor of humanity, and that armor has modeled itself at all times upon humanity with extraordinary precision.

Therefore, international law is not, strictly speaking, a law distinct from all others. It is only the enlargement, according to the size of the whole world, of the divers legal categories. It is as vast of itself as all the national legislations, over which it is superposed and which it is destined to absorb and unify. Its domain is immense, and one understands easily how it is that the societies and publications, which are devoted solely to the study of questions relating to international law, have multiplied to a singular extent these last years.

The problems of international law relate essentially to two main and traditional subdivisions, — private international law, which regulates the legal relations between individuals of different nationalities or the private rights of the individuals who are regarded as

isolated from the point of view of the legislations of the countries in which they have their domicile or residence; public international law, which regulates the relations between states, whether in times of peace or during conflicts and wars, and the legal organization of the society of nations.

Private international law is, as we think, more than public international law, destined to be the law of the future. It would be the law of the twentieth century, were it possible to suppress with one stroke of the pen or one act of the will the sixty historical centuries, the atavistic and hereditary influences of which place an almost insuperable obstacle in the way of the early unification of private law. This is apparent in a really striking way in the midst of the vast American Republic. Although each of the states which form the united republic is composed of elements almost identical, derived, for the most part, from the distant lands of Europe, nevertheless, each of these states preserves, with jealous care, the right to enact its own law and to differentiate it from that of the neighboring states.

Though it may be easy to understand and explain the diversity of local and cantonal laws of countries like Germany or Switzerland by the diversity of their races, or the influence of the feudal system, it is more difficult to understand and to explain how such a differentiation is produced among men who have been freed from the nationalistic prejudices which have still so strong a hold in the old world. In fact, it may be seen that one of the most serious difficulties in the way of making private law international will arise from the diversity of the legislations adopted by the states of the American Union.

This situation calls for most serious thought, for the old countries of Europe have all successively followed the example given by France when that country, carried away by the great humanitarian wave of the Revolution of 1789, and led by the steel will of Napoleon, decided to unify its local legislations and to endow the world with a civil code. Since then the other countries of Europe, first Italy, and last Germany, have unified their private law. Switzerland will before long possess a single civil code, the draft of which has already passed through the various stages preliminary to its final adoption.

This very phenomenon of national unification of the private law leads us to look for its international unification. It must not be forgotten that it is the countries where conflicts between local laws have been most strenuous in the course of the last centuries, where the statutory literature has been richest and most ingenious, namely Italy, France, and Belgium, which were the first to feel the inconvenience of multiplied legislations, and put an end to the regrettable controversies of former days amounting to veritable dialectical games and inconsiderate waste of intellectual forces. It would be

worthy of the great American Republic, the economical instrumentality of which tends to render the use of natural and physical forces as sparing as possible, to apply the same principles to its legal instrumentality, and to make of American law what it has made of American industry.

Even now, besides, humanity is proceeding, too slowly, as we think, toward the unification of private law. This movement, begun by the Paris International Convention of March 20, 1883, on industrial property (patents and trademarks) has been continued by the international convention of September 9, 1886, entered into at Berne regarding authors' rights (copyright). It is strange to see that it is precisely in that part of the law which has been codified most recently by the various nations, that of intellectual rights, that the need of legislation by international convention made itself felt first, and with the greatest intensity. This legal phenomenon appears, in a way, as the symbol of the nearing evolution of law.

A movement which is not less powerful has taken shape on the other side, in the course of the last quarter of the last century, in that part of the law which relates to the economical relations between nations. It will suffice that I recall the congresses which took up the bill of exchange, and the organization in 1896 of the International Maritime Committee, and its successive resolutions regarding collisions at sea, the liability of ship-owners, salvage and life-saving, all being the work of the conferences of Brussels (1897), Antwerp (1898), London (1899), Paris (1900), and Hamburg (1902). Here again it may be said that this phenomenon is symbolic of the human legal state of mind.

But while the intellectual life of the world and its economic life tend toward the unification of law, it is certain that as regards rights *in rem*, on the one side, and rights *in personam* on the other, unification will be realized only with the greatest effort.

Rights *in rem* have their origin in the nature of cultivation and development (of the soil), and often belong also to the manner in which the family is constituted. It will be sufficient to allude to the common ownership of pastures and woods, so frequent still in Switzerland and Belgium, to the parceling of lands in France, to the right of primogeniture in England, to the freedom of the home from seizure or attachment, proclaimed by various legislations, in order to realize how difficult it would be to secure at this time any unification in this matter.

As for rights *in personam*, which relate to guardianship, to majority, to marriage, divorce, to the rights between husband and wife, and between them and their children, to the matrimonial status, it is certain that difficulties, which are not less great than the difficulties relating to the rights *in rem*, are opposed to a near unification.



But the need of reducing to a minimum the realm of conflicts in these particularly delicate matters caused the calling by the government of Holland of a conference, which met in divers sessions and brought about the convention signed June 12, 1902, relating to marriage, divorce, separation, and the guardianship of minors. This convention will soon be followed by other similar conventions, which will cover the whole field of rights *in personam*.

On the other side the conference had already adopted, during a previous session, a convention signed November 14, 1896, relating to ticklish questions of civil procedure, particularly in matters of proving of judiciary and extrajudiciary documents, of rogatory commissions, security for costs, legal aid, and civil arrest.

What may likewise be considered as a sign of the times and a first step toward conventions of a still more extended reach than those which we have just noted is the convention agreed upon July 8, 1899, between France and Belgium regarding judicial jurisdiction, and the authority and execution of judiciary decisions, arbitrations, and also notarial documents. It is really certain that forms of procedure when so varied and special are one of the means most effectually availed of by persons of bad faith to render more precarious the economic relations between the several nations. Under the pressure of necessity, in this matter so strongly formalized and routine-like, the spirit of reform and reciprocal confidence has taken hold, and this again is a circumstance which, more than those we have enumerated, permits us to believe in human unity, and the unification of the law of the world.

It is pertinent to recall and proclaim here that the states of South America, by the memorable convention of Montevideo, entered into in January and February, 1889, had the honor and glory of giving the world a good example in the realm of private international law. When we examine the manner in which the unification of law has been accomplished among the several nations, we find that it was not brought about, with all the fullness which it involves, until the day when each people became definitely constituted in national unity. The private law of a nation was codified when the administrative and political instrumentality of that nation had become an accomplished fact.

We think that the same thing will occur for the family of nations, and that the private international law code will become a reality only on the day when the international administration will be definitely organized, and when the public law of nations will have been wholly formulated. We have the profound conviction that that is the duty nearest at hand of jurists and legislators, and already many conventions lead us surely toward the organization of a universal federation of nations.

The stages to be gone through from that point of view may, as we think, be summarized as follows: The creation of international offices, the organization of an international court, the preparation of a public international law code, the organization of an international parliament, the formation of a permanent international cabinet, and the adoption of an international budget to be voted on, universal disarmament and the creation of a force of international police, the selection of a world capital.

At first blush such an enumeration will cause many a smile and will arouse many doubts; but it is important to remember that the first international convention, which may be considered as the very first step upon the road, the itinerary of which we have made bold to indicate, dates back only to 1864, and that since then the number of similar conventions has increased with extreme swiftness. The fact is that in Geneva, on August 22, 1864, the Red Cross Convention for the purpose of improving the conditions affecting wounded soldiers belonging to armies engaged in campaigns was signed, and it is in this domain of war, which is in principle a negation of all humanitarian and brotherly thoughts, that a regulation was first attempted and accomplished.

Is not such a fact of a nature to destroy all doubts and justify every hope? Humanity, which acclaimed the performance of such an act and assured its execution, could not refuse to regulate, on an international scale, its innumerable material and intellectual needs, nor did it refuse; we might almost dispense with the mention of what has been accomplished from this point of view, for the work accomplished is contemporaneous, and surely present in all memories. But we deem it useful to sketch, in general lines, a synthetic picture of what has been done.

This work is above all evidenced at this day by the creation of international offices, the usefulness and value of which are not now contested by any one.

It is in the realm of transportation that the most important treaties have been signed and successively examined and agreed upon: The question of marine signals in the conferences of London and Paris in 1864, and that of uniform navigation rules studied from 1879 to 1897, in meetings called likewise in these two capitals; that of telegraphy and submarine telegraphic cables settled by the Paris Conventions of May 17, 1865, and May 14, 1884; that of the mails settled by the Berne Convention of October 9, 1874; that of railway transportation of merchandise settled by the Berne Convention of October 14, 1890. Mails, telegraphy, and railroads since then have at Berne special international offices.

This matter of the conveyance of ideas, men, and things has, thanks to the mails and to telegraphy specially, made of the earth a single

city, and permits us to be the terrified spectators of eruptions in Java and Martinique, of cyclones in Louisiana, and battles in Manchuria; thanks to steamers and locomotives it has made of the world a single market, the fluctuations of which, being felt as far as the antipodes, prove more than any other phenomenon the fact of the world solidarity; to this matter the question of weights and measures, which also was the subject of an international convention, the metric convention signed in Paris May 20, 1875, and for which a permanent office was established in France, is made to relate directly. It is to be hoped that this last convention, which proved so important in facilitating relations between men will, at an early day, bind all the nations that have not yet adopted the unity of metric measure. We are tempted to express a similar wish, though one which, alas! is more Platonic and the realization of which is more problematical, in favor of a universal monetary unity, and of an international monetary convention similar to that from which have sprung the Latin and Scandinavian monetary union agreements which were signed respectively in Paris December 23, 1865, and in Copenhagen May 27, 1873. At least, the legitimate hope may be expressed that the moneys of the various nations will be struck so as to establish simple relations between them, and thus facilitate their circulation upon the whole surface of the globe.

Humanity has pondered likewise over the question of regulating the struggle against the gravest diseases, which come from the unhealthy regions of the far-away Orient. The conventions entered into regarding this matter are numerous already, and have been signed successively in Dresden, April 15, 1893, in Paris, April 3, 1894, and in Venice, April 19, 1897. It is probable that similar conventions will come into existence for the purpose of attenuating endemic diseases like tuberculosis and syphilis. We may also refer to the phylloxeric convention reached in Berne, September 17, 1878, and which belongs to the same category. It is known that the conventions relating to cholera and the plague have brought about the creation of international stations of inspection.

This matter of social defense against diseases is intimately bound with the acceptance of an international pharmacopœia, the preparation of which has been intrusted to a special commission by a conference which met in Brussels in September, 1902.

Another convention, which also deserves having attention called to it, is that which was signed July 2, 1890, for the purpose of putting an end to the slave trade in Africa; the international office charged with the duty of having the provisions of this treaty carried out has its headquarters in Brussels.

In Brussels also is found the headquarters of the international

office for the publication of customs tariffs. This office was organized under a convention of July 5, 1890.

The international geodetic bureau, the headquarters of which is at Berlin, in accordance with the terms of a convention signed in that city October 27, 1886, may also be alluded to. To that convention, which is of a more particularly scientific character, may be said to be due the understanding reached between the main observatories of the world for photographing the skies in a uniform manner.

The intellectual ponderings which are at the basis of the geodetic and astronomic conventions, to which we have just referred, are likewise responsible for the signing of an international convention at Brussels, March 15, 1886, for facilitating the exchange of official documents and of scientific and literary publications. In each of the countries which became parties to said convention is found an office charged with assuring such exchange.

Finally, the conventions relating to industrial rights (patents and trademarks) and to copyright, to which reference has been made above in connection with the evolution of private international law, has likewise resulted in the creation of two permanent offices established at Berne.

Thus, it is seen, the international administrative instrumentality is in full formation. Although the international offices have been organized until now in a sporadic and scattered manner in many places, it is none the less certain that they already form an imposing whole, and everything presages that new offices will be added to those already established. It is sufficient to draw attention to the existence of the international offices created now without preliminary international conventions: The international colonial office and the international bibliographic office at Brussels, also the international labor office at Berne. To these may be added the permanent offices of a large number of international congresses which evidently are destined to become transmuted into official international bureaus recognized by the governments.

The establishment of an international court, which we consider as an essential element of the second stage, is also almost an accomplished fact. Henceforth that court possesses its headquarters and its palace. It virtually exists, though it may not be effective, for a court may be looked upon as existing only if it has judges and a procedure, and if it is permanent and can compel submission to its powers. As it is now organized, the international court is but a court of arbitration, the judges of which are selected by the parties in interest, and the intervention of which is essentially brought about by consent.

It is certain, however, that, although so organized, the court of



arbitration constitutes a considerable progress over what existed previous to its creation. Recourse to arbitration dates back to distant periods; traces of it have been found in the institutions of ancient Greece, and historians have proved its usage during the Middle Ages. But arbitration became an international custom in a somewhat regular way only after 1794, when the United States of America and Great Britain intrusted to arbitrators the solution of the first differences which arose after the War of Independence. Since that time these two nations have remained faithful, in a large measure, to that peaceful mode of settling international conflicts. Until the end of the last century, Great Britain and the United States were interested in and parties to seventy and fifty-six compromises, respectively, while all the European states together have had recourse to the jurisdiction of arbitration only eighty-nine times. This shows that the practical propaganda in favor of arbitration has been most followed by the nations of Anglo-Saxon origin.

It is interesting to note that recourse to arbitration has been singularly frequent in the course of the last century. There were but eleven arbitrations from 1801 to 1820, eight from 1821 to 1840; thenceforth their number increased as follows; twenty from 1841 to 1860, forty-four from 1861 to 1880, ninety from 1881 to 1900. Furthermore, recourse to arbitration was included, from 1823 to 1900, in numerous treaties by compromise clauses of either special or general character, numbering one hundred and thirty-eight. Finally, from 1880 to 1900 eleven permanent arbitration treaties were concluded.

It was natural that the idea of a permanent institution should arise in the minds of jurists, and it is known that the creation of an international court had been suggested and discussed long before the organization of the court of arbitration of The Hague. This discussion was mainly the work of volunteers, who, since 1815, have instituted an untiring propaganda in favor of peaceful ideas. The innumerable societies which they have created in all the countries of the world, and which have been grouped, since 1891, about the international bureau of peace in Berne, the congresses called by them since 1838, which have become regular and annual since 1889, have contributed largely, with the interparliamentary union, — the sessions of which, since its creation in 1889, have had from year to year greater importance and publicity, — to accustom the public and diplomacy to the idea of an international court.

It is known how the arbitration court was evolved from the deliberations of the Peace Conference. It will be recalled what profound world-wide emotion was aroused by the since famous rescript issued by the Emperor of Russia in 1898. While the enthusiasm of nations was great, the incredulity of diplomats was thorough. The failure of the conference was predicted and discounted, and those



who met on May 18, 1899, in the "*Maison au Bois*" certainly did not anticipate that a work endowed with life would spring from their deliberations.

Two months later, namely, July 9, 1899, thanks to the sincerity and energy of a few men, thanks to the atmosphere created by persistent peace-lovers, a convention for the peaceful settlement of international conflicts was entered into. It is divided into three chapters devoted respectively to good offices and mediation, to international commissions of inquiry, and to arbitration.

Arbitration was thus solemnly proclaimed as the normal and best mode of reaching a solution regarding differences between nations. Since then that procedure has become familiar to the public everywhere, and the expression, often misunderstood in the past, has taken its full value and acquired a rare force of penetration.

The official staff of diplomacy did not hesitate, nevertheless, to ignore the arbitration court. They were inspired by the hope of allowing the new institution to die through desuetude and to bury it beneath indifference and silence. But the United States of America, by their firm attitude, furnished to the arbitration court the opportunity of passing upon its first cause, and the difference relating to the California Pious Fund will remain, owing to that fact, a celebrated case under the law of nations, as famous as that of the Alabama controversy. Since then the conflict between Venezuela and a large number of powers, that between Japan and Germany, between France and Great Britain, have brought before the bar of the arbitration court most of the nations of the first rank in the order of their population and economic standing.

As has been said above, despite the fact of its existence and despite its activity, the arbitration court is not an international tribunal. Therefore the jurists and peace-lovers have taken up again their propaganda with new vigor: Recourse to this international jurisdiction must be compulsory, all nations must be able to appeal to its high intervention, and, finally, its competency must extend to all future conflicts, whatever their nature.

It is possible even now for the states which have not been admitted to take part in the deliberations of 1899, owing to a voluntary and unjustifiable forgetfulness, for which they may never be sufficiently blamed, to profit from the advantages of the convention relating to arbitration, as shown by Article xxvi thereof, which states that the court of arbitration is open to states not signatory which are in conflict with signatory states. It is under this provision that Venezuela was admitted to be heard before the arbitration court. Besides, Article xix authorizes states to conclude arbitration treaties of greater scope than the arbitration convention of 1899. Moreover, it is permissible for all states to conclude arbitration

treaties declaring that in case of a conflict the proper course will be to refer the matter to the judgment of the arbitration court of The Hague.

It is by reason of these provisions that Denmark and Holland, in their remarkable treaty of February 12, 1904, rendered arbitration as between them compulsory, and recourse to the arbitration court of The Hague possible, whatever the cause of conflicts bringing about disagreements. They took care, besides, to declare that all states may adhere to said convention by means of a simple notice.

Henceforth it is possible for all states, without a new meeting of the Peace Conference, to bring about a considerable progress in matters of arbitration jurisdiction. Henceforth the road is open to the formation of an arbitration union, and we shall be happy to see here again the United States in the rôle of giving anew in this case the example of a complete adherence to the principles adopted by Denmark and Holland.

But, as we think, such a progress is not entirely sufficient. It will be necessary that procedure before the international tribunal be modeled after the procedure before ordinary tribunals. It will be necessary that it be possible to summon, and also to give judgment by default, where a state is in default. No reason in principle is opposed to the introduction of that power in public international law, and no really effective jurisdiction can be conceived without it.

It will also be proper to have the judges who will form the international tribunal irremovable. At the present time the arbitrators are chosen by each of the parties among persons who are devoted in advance to the interests of the party which has appointed them; the odd arbitrator thus becomes the sole judge who decides with either one or the other set of judges. In order to assure their complete independence, it may become necessary to completely denationalize the international judges, and to place them in a state of absolute neutrality and incompatibility.

In order that the international court may be in a position to render decisions with full impartiality, not only must its formation be assured and its procedure regulated, but the law which it is to apply must be laid down for it. At the present time the international custom and the provisions of international conventions alone have served to guide the decisions of arbitrators. They, no doubt, will continue to have their guide, but there are general principles of international law which it would be well to formulate in precise texts. The body of these texts should form the international code.

Drafts of such a code have already been prepared by eminent jurists, so that this is not a matter of striving after a vain Utopia. The only important question to be faced is that of knowing if such a code will be the work of diplomacy or of a juridical international

committee. Or yet, whether it will be necessary to wait for its preparation until an international parliament shall become a reality.

If one is to refer to what has been done hitherto, it is evident that this care will be intrusted to diplomacy assisted, perhaps, by a special commission. It is a fact that diplomacy has definitely formulated in the Convention of July 9, 1899, the laws and customs of war on land, as it had previously formulated the rules relating to the care to be given to the wounded belonging to land military forces, and extended its scope by the special Convention of July 9, 1899, also to the wounded in naval war. The laws and customs of war had been drafted long before by the Institute of International Law, and had been adopted, in fact, by most of the governments of civilized countries.

The work to be performed by diplomacy in codifying the rules of the law of nations would not offer greater difficulties than the drafting of the laws of war, brought about by the deliberations of the Peace Conference. This will be mainly a work of coördination, for all the ticklish questions of the law of nations have been studied by notable jurists, and an almost complete understanding exists between them upon the essential points.

We had noted, shortly before, that the calling of an international parliament should, perhaps, precede the adoption of an international code which would essentially be the work of such a deliberating assembly. But the answer might be made that the gathering of such an assembly hardly seems probable. As for us, we deem that the calling of such a parliament has become a necessity, and that, therefore, it may become an early reality. Such an assembly exists even now, and though it has limited its work to the few questions of more immediate importance, it constitutes none the less an international deliberating body, created out of the various parliaments of the world. We are now alluding to the Interparliamentary Conference, constituted in 1899, and which held its twelfth session in St. Louis in 1904. This session has been particularly remarkable in that its object was precisely the adoption of a resolution to the effect that the states be requested to call an international parliament, a congress of nations. It is interesting to note that it is upon this American land, at the outset of the movement for peace, that a competition was opened on the question of what would be the best mode to employ for the purpose of assuring the organization of a congress of nations. It is from the land of America, one century after, that a call for identically the same purpose has just been issued with the approval of the representatives of fifteen divers parliaments. This shows that the idea is not Utopian, and that it appears as the logical consequence of all international evolution.

A question might be asked, nevertheless, namely, In what manner will the members of such an assembly be appointed? It seems to us that the various parties in the different parliaments might be called upon to appoint their delegates in proportion to their size, and the number of members to be appointed would be proportionate to the number of the inhabitants of each country, while assuring, however, a minimum number of representatives to countries with a small population.

It is hardly possible to conceive a parliament without a permanent delegation, charged with executing its decisions and bringing about the preliminary study of the problems to be resolved. Such a delegation will constitute in reality an international cabinet, and will be composed essentially by those at the head of the various organisms of international life. The importance of international offices at present established, and which are, as we think, the embryonic elements of the future department of the international cabinet, is now apparent. For it is difficult to conceive of such a cabinet otherwise than as a vast administration for international needs.

It is, of course, not easy to indicate at the present time how such a cabinet would be organized. But it may be anticipated as to some of its main departments. The department of land and marine transportation, first of all, will absorb the present post, telegraph, and railroad offices. That of hygiene will supervise the struggle against epidemics and epizootic diseases of all kinds, and of whatever origin, and will be charged with the carrying out of the international sanitary convention. That of the arts and sciences will absorb the offices relating to international exchanges, industrial inventions, intellectual works, the bibliographical international office, and the geodesic bureau. The special mission of supervising the formation of an international library and of a world university might also be given it. The department of justice would supervise the normal progress of the international tribunal, would prepare works of international codification, and insure the execution of the judgments reached over conflicts between states. It might be well to intrust to it the carrying out of the conventions relating to inferior races and African tribes.

Such a ministry or cabinet would, in fact, be only an enlargement and a coördination of the international administrations now existing, and the resources placed at present at the disposal of the various international offices might be considered as the elements for an international budget to be voted on by the international parliament. That budget, which would include only expenditures for peaceful purposes, would, by that very fact, be of modest size. At the present time the appropriations for the various international bureaus reach hardly the sum of a million francs. This small budget



for works having a world-wide bearing is in happy contrast with the enormous budgets of the various civilized nations.

We will now refer to a last point before ending this sketch of the work to be accomplished in the field of public international law. The present armies form, in times of peace as well as in times of war, an essential element of the life of nations. Will it always be thus? We make bold to affirm the contrary. All the arduous problems, half of which at least constitute the domain of public international law and which have for their object the rights of belligerents and neutrals, will be definitely eliminated. Even now the disarmament of nations appears as a work of paramount utility, despite numberless difficulties which seem to be in the way of its realization.

We need not recall that this disarmament was the main preoccupation of the Emperor of Russia in his rescript of 1898, and while its discussion has disappeared from the order of the day of the Peace Conference, it has, nevertheless, been solemnly declared by the diplomats gathered at The Hague that military burdens constitute for the nations an unbearable evil. Numerous publicists have not hesitated to face the problem, and the solutions suggested by them may be summarized as follows: Truce in armaments, partial and simultaneous disarmament, final disarmament. A truce in armaments would of itself bring about tremendous relief, for it would put an end to the competition in armaments which drags nations into making ever renewed expenditures, always becoming larger and weightier, leading toward irremediable bankruptcy.

Partial and simultaneous disarmament would, no doubt, be the nearest and most reasonable solution, and it does not appear henceforth as an impossibility, in view of the arrangements reached between Chile and the Argentine Republic, which had for their object the reduction of the naval forces of both countries.

There remains the question of final disarmament. Regarding this delicate matter the last Interparliamentary Conference did not hesitate to declare itself in favor of a thorough study. As has been said above, the question of disarmament has not been stricken off the programme drafted by the Czar; its discussion alone has been adjourned. The Interparliamentary Conference has but recently invited the governments to bring about the meeting in a new session of the members of the Peace Conference with a view to discussing the questions belonging to it, among which final disarmament figures in the first rank of international matters. This invitation was unanimously agreed upon, and it will have, as we hope, considerable weight with statesmen when they are considering taking action.

How may such a disarmament be conceived? It is known that the present armies have, in time of peace, only a limited size. The men who are freed from active service are thereafter incorporated



into civil life, and their final liberation could bring about no economic disorder. As for the troops under arms, it would be possible to maintain them in active service by transforming their mission of defense into one of police. Part of the troops of each of the states would form the nucleus of an international police, charged with assuring the carrying out of the decisions of the international court. Already at the time of the troubles in Crete, an international naval force was organized for the purpose of assuring in this conflict respect for the unanimous will of Europe.

This was only, of course, an ephemeral and passing event, and the gathering in one spot of armed soldiers of various nations, between which no unfortunate animosity exists at present, might not be free from a certain danger. But the example given recently by France and Great Britain shows that the most inveterate animosities may be effaced with a little good will. International interparliamentary visits, such as those of London and Paris, may be made more frequent and the friends of peace will spare no effort to bring them about. It is possible to create a peaceful opinion as an aggressive public opinion was created systematically in former days.

We firmly believe that it is in the interest of all, of governments and of nations, to guide definitely the course of world-politics in that direction, and it is not in vain, as we hope, that for the carrying out of these resolutions the last Interparliamentary Conference has appealed to the energetic and firm intervention of the head of the American Republic.

We have now come to the end of this swift enumeration, in the course of which we have striven to show what international law, private and public, now is and towards what goal it is proceeding. It is certain that its essential mission is to pacify the world. As the duel has degenerated from its primitive function of settling private conflicts until it has become an offense and a crime, war to-day, though still the object of legal rules which ratify its legality, will be transmuted into a crime committed by the many, and will be brought to the level of individual assaults *vi et armis* and become the object of provisions in an international penal code.

Only when really pacified will humanity formulate definite international law. It is for this reason that we have been brought to examine, in the course of this study, many questions of rather political than juridical character. But law is essentially an epiphenomenon. It is only the formula which is placed upon the fact. The jurist, being intimately convinced of this truth, is compelled to interest himself in events, to follow them and to influence them as far as possible, that he may assure by their realization the triumph of law in the world.

It is thus that we are led to ask ourselves a last question: In what place shall the administrative, legislative, and judiciary organs of humanity, having definitely entered into the juridical era, be situated? Where shall the world-parliament deliberate; in what city shall the international administrations be gathered; where shall the international court sit? We have already been invited to give our opinion regarding this problem, and we have not hesitated to give it a solution which would seem bold and audacious at first blush. In our opinion the most serious obstacle in the way of pacification of the world and of its submission to the sole force of law arises from the situation created by the war of 1870 between Germany and France. The colonial appetites, so acutely sharpened during these last years, did not succeed in creating serious misunderstandings between the civilized nations. The Berlin Convention of February 26, 1885, has shown that Europe was capable of viewing such difficulties with wisdom and moderation. But the conquest of Alsace and Lorraine has been the direct cause of the inconsiderate development of contemporaneous armaments. With a really exemplary courage, the study of this situation has been taken up anew during these last years, both to the east and the west of the Rhine, and various propositions have been suggested. The division or exchange of the conquered provinces has won over the most authoritative elements. It has seemed to us that the idea of neutralization was more fruitful if connected with the ideas here presented. The *Reichsland* of the German Empire would become the *Weltland* of the world-empire and *Strassburg* might become the modern *Cosmopolis*.

Where war has raged and triumphed, there should law be enacted and its respect assured by world-administration and an international court. About these political organisms would rapidly be grouped international scientific and intellectual institutions. There the main congresses might have their center of irradiation; there a universal library and a world-university might be organized most usefully; there the Association of Academies might have its main headquarters, and the dismantled fortress might become the vast human city open to all nations and all races.

There would be upon the earth only vast provinces of a vast empire, ruled by a single law, common to all men and all states.

## SOME PROBLEMS OF INTERNATIONAL LAW

BY CHARLES NOBLE GREGORY

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WHEN Hugo Grotius published his great work on international law he entitled it *Concerning the Law of Peace and War*. That obvious division of this great subject continues after the lapse of nearly three centuries.

"The law of war," says Professor Holland, "as is well known, consists of two great chapters, dealing respectively with the relations of one belligerent to the other and with the relations of each belligerent to neutrals."<sup>1</sup> He goes on to show that the former has been discussed for at least six centuries, not to mention classical antiquity. The latter is comparatively modern, dating as a separate subject only from the eighteenth century, "though it has already come far to surpass in complexity and importance the law of belligerency."

It is with some problems in this surpassing branch of the law of war, "the relations of each belligerent to neutrals," that we wish to deal.

### *The Treatment of Neutral Blockade Runners*

In discussing in print during the last year the law of blockade, the writer said that while "the older writers approved of the corporal punishment of the blockade-runner," yet "this is now wholly obsolete, and a confiscation of the ship, and, by the rule of infection, of any cargo belonging to the ship-owner, and of any portion of the cargo belonging to an owner cognizant of the blockade or who makes the master his agent, is the sole punishment."<sup>2</sup>

A very eminent and gifted English judge, whose name has for two generations been especially and most honorably identified with public law, — Sir Walter Phillimore, — by letter, courteously discussing the proposition, suggested to the writer that the rule could hardly be considered as settled; that it must be held at least in doubt. Sir Walter cited the practice of the United States in the war with the Confederacy, and especially the imprisonment of the late Sir

<sup>1</sup> *Studies in International Law*, by T. E. Holland (Oxford, 1898), p. 113.

<sup>2</sup> *Yale Law Journal*, April, 1903.

William Allan, M. P., and his published reminiscences of the same. Sir William, by birth a Scotchman, lived for years in the United States, but returned to his native country and was later captured by a United States cruiser in Savannah Harbor while serving as chief engineer on a vessel engaged in running the blockade. He was held in prison for six weeks, until he bribed a sentry to take a letter to Lord Lyons, British Minister at Washington, and was then released on parole.<sup>1</sup>

Unfortunately, I have been unable to find Sir William's published reminiscences. Neither is the State Department nor the Navy Department able to refer me to the facts in the case, nor has the incident been observed in a very extended examination of the printed volumes containing the history of the Federal and Confederate navies. However, Sir Walter quotes to me a letter from Sir William, written just before the latter's death in December last: "The United States authorities did imprison men taken in blockade-running. Our vessel (*Diamond*) was taken to Washington. We were turned over from the naval to the military authorities there, . . . marched to the provost marshal's quarters. Answered our names there, then our commitments to the old Capitol Prison were made out." There they were "quartered with prisoners and had hard usage." Eventually he was paroled out and given a written "parole" describing him as a prisoner of state, which parole he retained through life.

It must be freely admitted that owing to unfamiliarity with international law and to the suspension, as a war measure, of the writ of *habeas corpus*, so that our courts could not intervene, numbers of cases like the above seem to have occurred. That the situation was complicated by the fact that it was a matter of constant controversy, first, as to the neutrality of the ships, often claimed to be Confederate ships and only colorably sailing under a neutral flag; secondly, as to the nationality of the members of the crew, who were largely British, speaking the same language with the people of the United States, and who had often, like Sir William, lived for years in the United States. The rule excepting from imprisonment applies only to neutrals upon a neutral ship, and not to belligerents, or subjects, or to those operating a vessel of the belligerent government.

So the commandant of the Philadelphia Navy Yard wrote Acting Rear-Admiral Lee March 31, 1863: "I have disposed of the crews of the captured vessels — foreigners sent on shore, and citizens of the United States confined."<sup>2</sup>

March 24 in the same year, Captain Boggs of the *Sacramento*, one of the blockading ships off Wilmington, wrote to the rear-ad-

<sup>1</sup> *The Daily Chronicle*, London, December 29, 1903.

<sup>2</sup> *Official Rec. U. S. and Confed. Navies*, series I, vol. VIII, p. 643.



miral in command, asking instructions as to the disposition of persons "taken out of vessels seized as a prize for violating the blockade. To send them north in the vessel would require a much larger prize crew than the exigency of the fleet will permit. They are generally a daring set of men, and the compensation to them would be the strongest inducement to attempt a recapture."<sup>1</sup> The rear-admiral instructed him in reply to send those known, or for good cause suspected, to be citizens of the United States, north to the commandant of the navy yard to which the vessel conveying them might be bound. "Those against whom no such proof or suspicion is entertained, if they are not needed as witnesses in the adjudication, will be released from the blockading vessel as soon as practicable."<sup>2</sup>

Certain of the crew of the captured British blockade-runner *Adeline* were released on signing an engagement not to be again employed in like proceedings. Secretary Welles instructed the flag officer of the blockading squadron that the Secretary of State held this not warranted by public law and that the crew could not be held as prisoners of war and that they were absolved from the obligation.<sup>3</sup>

On July 25, 1863, President Lincoln instructed the Secretary of the Navy as follows:

"You will not in any case detain the crew of a captured neutral vessel or any other subject of a neutral power on board such vessel, as prisoners of war or otherwise, except the small number necessary as witnesses in the prize court.

"NOTE. — The practice here forbidden is also charged to exist, which, if true, is disapproved and must cease. [The President adds:] What I propose is in strict accordance with international law, while if it do no other good, it will contribute to sustain a considerable portion of the present British Ministry in their places, who, if displaced, are sure to be replaced by others more unfavorable to us.

"Your obedient servant,

"ABRAHAM LINCOLN."

The right as a reasonable precaution to place the captured crew in irons lest they rise and overpower the prize crew was maintained in an elaborate letter of Secretary Seward to Lord Lyons in 1861.<sup>4</sup>

The crew of the *Emily St. Pierre*, taken off Charleston, did retake the ship, gagging and putting in irons the prize officers and crew.<sup>5</sup>

In January, 1864, the Department of State sent to the Secretary of the Navy intercepted correspondence showing that vessels oper-

<sup>1</sup> *Official Rec. U. S. and Confed. Navies*, series I, vol. VIII, p. 625.

<sup>2</sup> *Ibid.* vol. VIII, p. 804.

<sup>3</sup> *Ibid.* vol. XII, p. 462.

<sup>4</sup> *Ibid.* vol. XII, p. 407 *et seq.*

<sup>5</sup> *Ibid.* vol. XII, p. 814.



ated by the Confederacy in blockade-running were under orders to conceal their nationality, and suggesting that it would be proper to direct that henceforth British blockade-runners be detained in custody and not released as heretofore. Secretary Welles ordered accordingly and countermanded inconsistent orders,<sup>1</sup> but this was in turn revoked by the Secretary of the Navy May 16, 1864, and full instructions issued in accord with the views of President Lincoln, before expressed,<sup>2</sup> exempting *bona fide* neutrals on neutral ships from treatment as prisoners of war, and holding them "entitled to immediate release."<sup>3</sup>

The modern doctrine that neutral blockade-runners on a neutral ship are not subject to bodily punishment is not contravened, it is submitted, by the ultimate practice of the United States in its blockade of the Confederate coast, by all odds the greatest blockade known to history. It is believed that it is sustained by the text-writers generally.<sup>4</sup>

In the second great blockade of the past eighty or ninety years, that of the Cuban coast, the *Instructions of Blockading Vessels and Cruisers*, issued by the Secretary of the Navy of the United States in 1898, and prepared by the State Department, expressly declare: "9. The crews of blockade-runners are not enemies and should be treated not as prisoners of war, but with every consideration."

The whole subject is most admirably reviewed by Calvo. The older practice is shown and that of the United States in the war with the Confederacy, and at the close he justly observes: "The usage concerning the non-infliction of bodily punishment on persons guilty of violation of blockade has become uniform enough so that we can consider confiscation of the property captured as now the sole punishment."<sup>5</sup>

The consul-general of the United States at Yokohama, by letter of July 27, 1904, kindly advises me that in the present Russo-Japanese war the Japanese have treated neutrals captured in attempting to run the blockade at Port Arthur in the same way, holding them as witnesses, it might be, but not as prisoners of war. That is, however, not strictly a blockade. The legation of Japan at Washington, under date of August 13, 1904, advises me of like practice by Japan as to officers and crews of neutral ships recently captured while carrying contraband, which is comparable to breach

<sup>1</sup> *Official Rec. U. S. and Confed. Navies*, series 1, vol. ix, p. 285.

<sup>2</sup> *Ibid.* vol. ix, p. 405.

<sup>3</sup> *Ibid.* vol. x, pp. 60, 61.

<sup>4</sup> Gaulaudet on *Inter. L.* (condensed from Calvo), p. 298; T. J. Lawrence, *Prin. Inter. L.*, p. 592; Walker's *Inter. L.*, p. 525; Woolsey, *Inter. L.* (1899), p. 351; Hall's *Inter. L.* (1904), p. 710; 3 Phillimore's *Inter. L.*, p. 506 *et seq.*

<sup>5</sup> Calvo, *Le Droit International*, tome v, sec. 2899.

of blockade, and such persons have been treated in the same way by Russia.

The rule as quoted from Calvo, that great and authoritative writer on public law, seems, it is submitted, to meet with continued and universal acquiescence.

### *Contraband of War*

On the 14th of February, 1904, Russia, by proclamation, announced that in the war with Japan she would treat as contraband combustibles of all kind, such as coal, naphtha, alcohol, and other like materials. Also all materials for the installation of telegraphs, of telephones, or railroads. This proclamation, together with an explanatory instruction of March 6, also declares contraband anything capable of serving as food or forage for the Japanese army, and especially rice and fish and its different products, beans and their oil.<sup>1</sup> By ordinance of April 26, cotton was added to the list. Under these declarations and ordinances, Russian war-ships have seized neutral vessels bound for Japanese ports and claimed as prize of war articles of the character listed. For instance, they have seized and caused to be condemned a cargo of American flour on a neutral ship not consigned to the Japanese Government or in any way ear-marked for belligerent use except by its destination to a port of Japan.

The doctrine that articles which may serve alike the uses of peace or war are not contraband unless intended for the military uses of a belligerent rests on two broad principles:

*First.* That neutrals under modern usage cannot be hindered in their general right to trade in innocent articles of commerce with belligerents except by an actual blockade, never by a proclamation.

*Secondly.* International law forbids a belligerent to make war upon the civil or noncombatant population of its opponent, and, as Hall says: "Hence seizure of articles of commerce becomes illegitimate so soon as it ceases to aim at enfeebling the naval and military resources of the country and puts immediate pressure upon the civil population."<sup>2</sup>

The claim of Russia has been at once controverted. The Department of State of the United States, in a communication to the ambassadors of the United States of June 10, took the ground that articles of double use (*ancipitis usus*) are contraband if they are destined for the military uses of a belligerent. It points out that the principle of the Russian declaration "might ultimately lead to

<sup>1</sup> *Revue Générale de Droit International Public*, Mai et Juin, Documents, p. 12 et seq.

<sup>2</sup> Hall's *International Law*, (5th ed. 1904), p. 656.

a total inhibition of the sale by neutrals to the people of belligerent states of all articles which could be finally converted to military use," and adds that such principles "would not appear to be in accord with the reasonable and lawful rights of a neutral commerce." Queen Elizabeth would not allow the Poles and Danes to furnish Spain with provisions, alleging that by the rules of war "it is lawful to reduce an army by famine."<sup>1</sup> But the present government of England has expressed its accord with the views of Secretary Hay by an official note of protest, dated August 1, against the claim that food is absolutely contraband.<sup>2</sup> Lord Lansdowne, in the Lords, August 11, said that the Russian declaration "greatly amplified the definition of contraband, including much England regarded as innocent. England would not consider herself bound to recognize as valid the position of any prize court which violated the recognized international law." And Mr. Balfour in the Commons, on the same day, said as to the doctrine that a belligerent could draw up a list of articles it would regard as contraband and that prize courts must decide accordingly: "If that doctrine were accepted without reservation, neutrals would be at a serious disadvantage." August 25, in reply to the shipping deputation, Mr. Balfour said there was no possibility of Great Britain receding, inasmuch as she knew she stood "on the basis of all recognized international law to be found in all the text-books and in accordance with the general practice of civilized nations."

The English view, and it is believed it is the view of the world, is well put by the *Law Times* of London.<sup>3</sup> It declares "the position of Russia as to contraband cannot be accepted for a moment by Great Britain," and says the point is well summed up by the *London Times* in a leading article: "To entitle a belligerent to treat goods as contraband, there must be a fair presumption that they are intended for warlike use, and such presumption does not arise from the mere fact that they are consigned to a belligerent port. In other words, non-blockaded ports should be open to the legitimate trade of neutrals, and belligerents who . . . have not the power to establish an effective blockade cannot be suffered to attain the object of such blockade by an . . . extension of the definition of contraband."

At least, since the Declaration of Paris of 1856, a paper blockade is of no legal force, and a blockade to be recognized by the law of nations must be "maintained by a force sufficient really to prevent access to the coast of the enemy."<sup>4</sup> This immensely increased the

<sup>1</sup> Taylor's *International Law*, p. 736; Grotius, *Droit des Gens*, III, secs. 112, 117, and note to sec. 112.

<sup>2</sup> *Boston Evening Transcript*, August 9, 1904.

<sup>3</sup> *Law Times*, August 13, 1904, p. 330.

<sup>4</sup> Wheaton's *Inter. L.*, 4th Eng. ed., 1904, p. 691. See this also declared in

security of neutral commerce and ought not, by the device of declaring an extension of the list of contraband articles, to be done away at any time by any belligerent. The Russian declaration, which seeks to treat as contraband substantially all fuel and food and the staple from which clothing is made, would certainly have this effect if enforced, and the most objectionable harrying of neutral commerce and deprivation of noncombatant belligerents would be liable to follow. That this is no small matter to neutral trade is shown by a very simple consideration of the facts. If we regard the excessive number of two or even three millions of persons as engaged in or by location or otherwise infected by the warlike operations of Japan,<sup>1</sup> then neutral ships cannot carry supplies of food or fuel or clothing to those three millions without liability to seizure, but they may still carry such supplies with entire immunity to some forty-two millions of Japanese, constituting the civil population. The extension by the terms of the Russian proclamation is of a limitation, lawful as to one fifteenth of the people, to the whole people, and it seems an unwarranted invasion of the plain rights of neutrals to trade in these great staples with forty-two millions of people.

It is certainly customary for belligerents to announce what articles they will treat as contraband, and the Institute of International Law resolved in 1877 that belligerent governments should determine this in advance on the occasion of each war,<sup>2</sup> and Prince Bismarck so stated in reply to a complaint of Hamburg merchants; but no substantial alteration of the rules of international law can be so made.

If a belligerent, commanding the sea, can thus paralyze the neutral transport of food, fuel, and the staples of clothing, the suffering and death inflicted on the millions of noncombatants in such island nations as Great Britain or Japan are appalling and quite unwarranted by public law, and the blow to neutral commerce is utterly destructive.

Considering the greatly improved facilities for inland transit, the test of noxious or not according to the character of the port of consignment may require modification, but such articles are, by the great weight of authority and practice, not, as Russia would make them, absolutely contraband, but conditionally so, if intended for warlike use.

So late as December, 1884, Russia, at the Congo Conference, declared that she would not regard coal as contraband,<sup>3</sup> and food-stuffs were not in her list of contraband in 1900.<sup>4</sup>

Russian Declaration of February 14, 1904, "*Le blocus, pour être obligatoire doit être effectif.*"

<sup>1</sup> The entire number of persons in the army and navy of Japan, including reserve and landwehr, as appears by the *Statesman's Year-Book* of 1904, p. 864, was 667,362.

<sup>2</sup> Hall's *International Law*, 5th ed. 1894, p. 653; *Annuaire* for 1878, p. 112.

<sup>3</sup> Lawrence's *War and Neutrality in the Far East*, p. 158. <sup>4</sup> *Ibid.* p. 166.



His Excellency, Count Cassini, the ambassador of the Czar at Washington, on the 15th of September, kindly called my attention to the fact that: "As to the question of one of the belligerents declaring absolute contraband goods, not generally recognized as such, it cannot be regarded as something quite unusual. During the Franco-Chinese war, for instance, the French Government declared rice absolutely contraband without consideration to its use, which declaration was left unprotested by any neutral power."

With deference it is submitted that the action of France was in that case promptly protested by England and that Lord Granville gave notice that Great Britain would not consider herself bound by a decision of any prize court in support of the claim of France, and no seizure of rice was in fact made.<sup>1</sup>

Supplies of American canned meats bound for Port Arthur and Vladivostock were, at the opening of the war, seized by the Japanese, but they were plainly contraband as destined for the use of the enemy's armed force.<sup>2</sup>

As Dr. Lawrence shows, England imports about four fifths of the wheat and flour she consumes, and, as he says, "The value of our food trade to other nations secures that we shall receive powerful assistance in our efforts to keep it open. It is a matter of life and death for us to prevent any change in international law which shall make the food of the civilian population undoubtedly contraband, and if arguments and protests will not do it, force must." <sup>2</sup>

The United States is a great exporter of cotton (she produces about two thirds of the world's supply) and of food products. About one half of her population is directly engaged in agriculture, or constitutes the households of those who are so engaged. As a result, no government can maintain itself in that republic which does not use all possible efforts to keep open this foreign trade in field products.

Against earnest and concurrent action on the part of these two powers it would seem strange if Russia should successfully carry out her plan for extending the definition of contraband, and so turn back the happy progress of neutral right. In so far as condemnations have already taken place, they will undoubtedly be the source of claims for damages which will not be easily satisfied.

The fact that cotton was declared contraband by the United States in its war with the Confederacy seems hardly in point, as cotton was then substantially a government monopoly in the Confederacy and almost its only source of revenue.<sup>3</sup> Cotton and its seed are the most considerable item in the imports of Japan, being

<sup>1</sup> Hall's *International Law*, 1904, pp. 662, 663; Lawrence's *War and Neutrality in the Far East*, p. 164; Wheaton's *International Law*, 4th Eng. ed. 1904, p. 672.

<sup>2</sup> Lawrence's *War and Neutrality in the Far East*, p. 167.

<sup>3</sup> *Ibid.* p. 171.



almost twice as great again in value as sugar, the second article in value in the list.

The whole record as to claims and rulings as to contraband is singularly confused and conflicting, but the claim advanced by Secretary Hay seems so clearly within the practice and the weight of authority of the past half-century that it is hoped it may prevail. Neutral rights are the rights of the vast majority, and they should not be lightly prejudiced for those of the belligerents, who are always a small minority. The disturbance to trade, moreover, caused by a state of belligerency between any two maritime nations is now world-wide. Steam and electricity have made us all near neighbors, and exactly as the peace and order of a closely-settled urban community must be kept by far more stringent regulations than that of a community of scattered shepherds and farmers, just so the peace and security of the vastly increased and greatly more connected and interwoven commerce of the modern seas must be preserved by correspondingly adequate rules.

The St. Petersburg dispatches of September 12 seem to intimate that Russia, upon the advice of the commission of eminent persons appointed by her to consider this matter, is inclined to modify her declaration as to absolute and conditional contraband in substantial accord with the American and British notes, except as to cotton, and this is confirmed by those of the 19th. The action is received with very wide satisfaction, and, it is believed, is in accord with the peaceful and beneficent sentiment of the world. Russia is to be congratulated upon the wisdom and humanity of this action, and Secretary Hay upon his successful protest against what he well characterized as "a declaration of war against commerce of every description between the people of a neutral and those of a belligerent state."

### *Belligerent Act in a Neutral Harbor*<sup>1</sup>

The seizure of a Russian vessel of war by the Japanese in the Chinese harbor of Chefoo on August 12 involves most grave questions of international law. The Russian vessel was pursued by Japanese destroyers, but escaped from them in the night. They later found her in the neutral harbor. The Japanese vessels waited outside the port. The Russian failed to come out. The Japanese commander, anticipating his escape by night and a possible attack on merchantmen, entered the port with two destroyers. It is claimed the Russian had been in port twenty-seven hours, and was not yet

<sup>1</sup> A reply to this discussion was printed by Mr. K. K. Kawakami, attached to the Imperial Japanese Commission at St. Louis, in the *Japanese-American Commercial Weekly*, of September 24, 1904.

completely disarmed. A Japanese officer with an armed force was sent on board in the night — the hour was 3 A.M. — with a message that the Japanese expected her to leave by dawn or to surrender. The Russian commander refused and was overheard directing that the ship be blown up. At the same time he seized the Japanese officer and threw him overboard, falling with him, and the Japanese interpreter was thrown overboard. The forward magazine exploded, killing and injuring several. The Japanese being armed, and the Russians disarmed, the former prevailed in the *mêlée* and took possession of the vessel and removed her from the harbor. The Japanese loss, due to the explosion, was one killed, four mortally wounded, and nine others injured. Admiral Alexieff informed the Czar that the vessel was disarmed the day before, according to arrangements with the Chinese officials. The captain and most of her officers and crew swam ashore and reported that the Japanese fired on them as they fled. The Russian captain reports that he had disarmed the ship, and having no arms to resist what he calls a piratical attack in a neutral harbor, ordered the ship blown up.

Admiral Alexieff says the Russians were conferring with the Chinese officials as to a temporary stay to repair the ship's engines, and had given up to the Chinese officials the breech-blocks of the guns and rifles and had lowered the ensign and pennant.<sup>1</sup>

Russia earnestly protested at Peking against this violation of a Chinese port. Japan retained the vessel and justified the seizure on several grounds, claiming that the Russian ship was not effectively disarmed; that her continuance in the harbor after the lapse of twenty-four hours was itself a violation of the neutrality of China and so absolved Japan; that the visit was to ascertain whether or not the ship was in fact disarmed adequately and whether she had just claim to remain for repairs, and to demand her departure otherwise, and that the Russians began hostilities and thus justified the Japanese in the capture; that the weakness of China in enforcing her neutrality and the nearness of the port to the seat of war all excused the transaction.

It is respectfully submitted that none of these can be accepted as justifying the capture without suffering serious impairment of the sanctity, the peace, and order of neutral harbors and encouraging a painful retrogression in the public law applicable.

As Wheaton says, Bynkershoek alone, of writers of authority, allows the seizure of a vessel pursued into neutral waters, and even he admits he has never seen this doctrine in any but the Dutch writers.<sup>2</sup> Mr. John Bassett Moore shows that Bynkershoek's doctrine as to right of pursuit is almost unanimously condemned col-

<sup>1</sup> See *London Times* (weekly ed.), August 19, 1904, p. 532.

<sup>2</sup> Wheaton's *International Law*, sec. 429 (4th ed. Eng.).

lecting the authorities upon the subject,<sup>1</sup> and he also shows that in 1806 President Madison so held in protesting against the destruction of a French ship *L'Impétueux*, disabled by a gale and destroyed by the *Melampus* and two other British ships on the coast of North Carolina. The present was, moreover, hardly a case of fresh pursuit, the Russian vessel having eluded her pursuers and having been later found in the Chinese port.

The practice of powerful belligerents, and especially England, was formerly to pay little, if any, attention to the sanctity of a neutral port, yet the practice seems never to have been deemed lawful.

Here are some of the old precedents involving hostile meetings of war-vessels in neutral waters. During the second Punic war, Scipio, with two Roman galleys, entered the port of Syphax, king of Numidia, to seek his alliance. There he found Hasdrubal upon a like errand with seven Carthaginian galleys, but they "durst not attack him in the king's haven."<sup>2</sup> The Venetians and Genoese being at war, their fleets met in the harbor of Tyre, "and would have engaged in the very haven, but were interdicted by the governor," and therefore went to sea and fought in the open.<sup>3</sup>

In 1604 James the First of England forbade acts of belligerency in certain waters near the English coast; but in 1605 the Dutch and Spanish fleets fought in Dover Harbor. The English castle was silent until the victorious Dutch bound their prisoners two by two and threw them into the sea; then at last the castle battery fired upon the inhuman victors<sup>4</sup>. England here tardily resisted a breach of the neutrality of a British port. However, a year later, the Dutch East India fleet was attacked by the British in Bergen Harbor. The governor of the town fired upon the attacking fleet.<sup>5</sup>

Four French ships of war which fled to Lagos after conflict with the English off Cadiz, in 1759, were destroyed in that harbor by the English. Portugal made complaint to England. Pitt was civil and an apology was duly made by the Earl of Kinoul as special ambassador extraordinary, who promised that the British would be more careful in the future, but there was no restitution or compensation.<sup>6</sup>

Phillimore declares this "a clear and unquestionable violation of the neutral rights of Portugal, and it was one of the causes of war by France against Portugal."<sup>7</sup>

In 1781 an English squadron in Porto Praya, in the Cape Verde

<sup>1</sup> Moore's *International Arbitration*, p. 1120.

<sup>2</sup> Moore's *International Arbitration*, p. 1116, quoting the incident from Livy.

<sup>3</sup> Moore's *International Arbitration*, p. 1117, quoting Molloy, *De Jure Maritimo* (5th ed.), p. 12.

<sup>4</sup> Walker's *International Law*, pp. 169, 170; Grotius' *Hist.* vol. XIV, p. 794.

<sup>5</sup> Vattel, bk. III, chap. VII, sec. 132.

<sup>6</sup> Dana's *Notes to Wheaton*, sec. 430; Moore's *International Arbitration*, p. 1127.

<sup>7</sup> Phillimore's *International Law*, sec. 373.

Islands, was attacked by a French fleet. The Portuguese fort resisted the attack and no prizes were taken. The French Government approved the attack, as Ortolan says, perhaps in retaliation for the action at Lagos.<sup>1</sup>

The French frigate *Modeste* was captured by the English in the harbor of Genoa in 1793. There was neither apology nor restitution.<sup>2</sup>

In the war of 1812 the United States frigate *Essex*, at anchor and dismasted in Valparaiso Harbor, was attacked and captured by two British ships. The *Levant*, a prize of the United States frigate *Constitution*, was chased into Porto Praya and there captured while at anchor by vessels from the British fleet.<sup>3</sup>

The American privateer *General Armstrong*, a brig of seven guns, was attacked and destroyed by a British squadron of one hundred and thirty guns in the harbor of Fayal in 1814.<sup>4</sup> The resistance was most gallant and assaults were repeatedly repulsed with great loss of life. The Portuguese governor interposed with the English commander to obtain a cessation of hostilities, but the latter claimed that the *Armstrong* had fired upon the English boats without cause and that he would take possession of the privateer in consequence, saying that if the Portuguese interfered he would treat the castle and island as enemies. It appeared that at evening the long-boats of the British squadron, with a large force, apparently armed, outnumbering the crew of the privateer, approached so as to touch her stern with a boat-hook. They were warned off, and not desisting, were fired on with fatal results, and returned the fire. The English commander claimed that he intended to reconnoiter the privateer merely, and to observe the neutrality of the port. The circumstances were such that the Americans thought themselves justified in taking the approach as an attack and attempted boarding, and in resisting accordingly. The vessel lay during most of the affray within a half-pistol-shot of the castle. Some buildings were burned and persons were killed upon the land by the British cannonade, well illustrating the results of such a practice.

This was the foundation of a claim against Portugal by the United States for failing to keep the peace of the port. On a reference to Louis Napoleon, President of the French Republic, as arbiter, he finally held, in 1852, a few days before he assumed the imperial dignity, against the claim, on the ground that the Americans did not apply for protection to the Portuguese authorities in time, and that they fired first upon the British boats as they approached in the night. This case has been cited as the principal case supporting the conduct of the Japanese at Chefoo.

<sup>1</sup> Moore's *History of International Arbitration*, p. 1127; *Diplomatie de la Mer*, II, 320.

<sup>2</sup> Hall's *International Law* (ed. of 1904), p. 602.

<sup>3</sup> Dana's *Notes to Wheaton*, sec. 430.

<sup>4</sup> Wharton's *Digest*, 604; Snow's *Cases in International Law*, p. 396.



Dana says that the "decision was not satisfactory to the United States Government, as they did not consider the fact on which it rested as established in proof." He thinks the rule should be confined to cases where the vessel "makes a fair choice to take the chances of a combat rather than to appeal to neutral protection."<sup>1</sup>

Lawrence thinks the doctrine of the decision has been fully accepted by British publicists, while American jurists have been disposed to deny or qualify it, but he reaches the conclusion that the side which in a neutral harbor fights purely in self-defense can hardly on that account forfeit the right to redress.<sup>2</sup>

The rule that the belligerent captured in a neutral port cannot recover compensation from the neutral power unless he demanded protection and there was failure to afford it, is by no means an indication that the neutral may not demand satisfaction for the invasion of its sovereignty without any such circumstances. The basis of recovery is the negligence of the neutral in one case, but the basis of recovery in the other is the trespass of the offending belligerent.

Mr. Justice Story, a person quite as extensively versed in public law as Napoleon the Third, considered that a belligerent attacked in neutral territory is justified in using force in self-defense.<sup>3</sup>

It is impossible that international law should be so divorced from the law of nature and all municipal law as to hold otherwise, and in the private law of self-defense one may always justify upon the appearance of necessity.

It is believed that later practice and decisions in no way warrant the invasion of a neutral port even to seize or attack a hostile cruiser harboring there. Ortolan long since, while strongly supporting the extritoriality of ships of war, yet declared that if the vessel of war in territorial waters undertakes to commit any acts of aggression or hostility or violence, it is the right of all nations immediately to take all the measures and employ all the means necessary for a legitimate defense.<sup>4</sup> It is literally defense against a hostile invasion.

The more recent precedents are as follows: Near the opening of the Franco-Prussian war, a French ship, after an unsuccessful combat with a German ship off the harbor of Havana, escaped into the harbor. The German vessel respected the neutrality of the Spanish port and did not further molest the French ship, which remained at Havana until the close of the war.<sup>5</sup>

The United States warship *Wachusett* in 1864 attacked and captured the Confederate cruiser *Florida* in the harbor of Bahia and

<sup>1</sup> Dana's *Notes to Wheaton*, sec. 430.

<sup>2</sup> T. J. Lawrence's *International Law*, p. 540.

<sup>3</sup> Hall's *International Law* (ed. of 1904), p. 625, and note citing *The Anne*, 3 Wheaton, 477. See also T. J. Lawrence, *International Law*, p. 540.

<sup>4</sup> *Diplomatie de la Mer*, ix, 218.

<sup>5</sup> *Harper's Weekly*, August 27, 1904, p. 1309.



towed her to sea. In that case, also, there was resistance and shots were exchanged and three men were injured on the attacking vessel.<sup>1</sup> She was pursued by a Brazilian man-of-war, but escaped by superior speed. Although feeling against vessels of the class of the *Florida* and against countries harboring them was most intense, yet the act was repudiated wholly by the United States, the commander of the Federal vessel was court-martialed, the consul who had advised him dismissed, and the Supreme Court held that Brazil was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise, and that the captors acquired no rights.<sup>2</sup>

In like manner, in the case of the American steamer *Chesapeake*, which was, it was claimed, piratically seized on a voyage between New York and Portland in 1863 by certain alleged Confederate partisans, who took passage on her in New York, she having been pursued by a warship of the United States into Nova Scotian waters and there seized, and two men on board and one of the leaders of the partisans on a neighboring vessel taken into custody; the vessel and the men were surrendered by the United States and an apology made for violating British territory.<sup>3</sup>

Dispatches from Buenos Ayres of August 28, 1904, show that relations between Argentina and Uruguay have become strained through an attack by Uruguay on an insurrectionary force directed against her, but in Argentine waters.

The cases holding the seizures of merchant vessels in neutral waters void are too numerous to collate and are therefore omitted.

The fact that the Russian ship had remained more than twenty-four hours in the Chinese harbor shows a possible violation of the twenty-four-hour limit adopted by China in her declaration of neutrality, if the Russian ship was not, as claimed, detained for necessary repairs and already disarmed.

The limit of twenty-four hours was one which China could adopt or not in her discretion and therefore could enforce or not.<sup>4</sup> No other power had the right to enter her ports to enforce it. It is usual, but not a legal obligation, for neutral nations to fix such a limit for the stay of belligerent ships of war in their ports. Though such a rule seems in process of formation as a requirement, yet during the present operations, though many have, numerous nations appear not to have announced such a limit.

In the case of a Russian gunboat in the harbor of Shanghai which failed to withdraw on the demand of China, Dr. Lawrence says that Japan "might have given notice to China that she would no longer

<sup>1</sup> Maclay's *History of the Navy*, vol. II, p. 557.

<sup>2</sup> *The Florida*, 101 U. S. 37; Hall's *International Law* (ed. 1904), p. 620.

<sup>3</sup> Hall's *International Law* (ed. 1904), p. 620; Wheaton's *International Law* (11th ed. Eng.), p. 580.

<sup>4</sup> Dana's *Notes to Wheaton*, sec. 429.

respect the territorial waters of a state which seemed powerless to defend its neutrality, or she might have claimed reparation for the indulgence shown to her opponent."<sup>1</sup> She did neither, but after long parley the Russian vessel was dismantled. The statement of the rights of Japan seems extreme, and the constant assumption that the twenty-four-hour limit is a provision of international law which a belligerent may enforce against any neutral seems wholly unwarranted.

A practice of declaring such limit is widespread and growing, but the rule on this subject, as stated in the edition of Wheaton published within the year with notes by J. Beresford Atley, is as follows: "The reception or exclusion of belligerent cruisers and their prizes in neutral ports is a matter entirely at the discretion of the neutral government."<sup>2</sup> He shows that the limit of twenty-four hours for the stay of a belligerent ship of war in a neutral harbor is not half a century old and depends on the action of the neutral power in declaring it, and that it is not a settled obligation of international law.

Lawrence thinks the twenty-four-hour regulation admirable, and points out that neutrals are bound to treat both belligerents alike, but says the law of nations allows the stay of belligerent vessels in neutral ports, and that we have no right to complain where this regulation is not adopted. He says expressly that the common "assumption that international law forbids belligerent vessels to enjoy the shelter of neutral ports for more than twenty-four hours at a time . . . is an error, but one so general that those who give expression to it have much excuse."<sup>3</sup>

A neutral state may at will close all its ports to belligerents, and the *New York Nation* says: "Norway and Sweden, we believe, have done so in the present war."<sup>4</sup> It is believed that Norway and Sweden and Denmark have excluded warships of the two belligerents from a large number of their principal fortified ports, but not from all. Their proclamations of neutrality seem so to provide, and this has been their policy for half a century.<sup>5</sup> They impose the twenty-four-hour limit in such ports as are left open.

The fact that Japan on September 11 made protest against the Russian auxiliary cruiser *Lena* remaining in San Francisco Harbor longer than twenty-four hours brings home the question to the United States Government. The vessel claimed that she was detained for necessary repairs and the United States took steps to ascertain whether or not this was well founded, and enforced very

<sup>1</sup> *War and Neutrality in the Far East*, p. 138.

<sup>2</sup> Wheaton's *International Law* (4th Eng. ed.), p. 587, note.

<sup>3</sup> *War and Neutrality in the Far East*, p. 120.

<sup>4</sup> *The Nation*, August 4, 1904, p. 101.

<sup>5</sup> *Revue Générale de Droit*, Mai et Juin, 1904, pp. 14 and 15 of Documents.

fully its neutral regulations by directing the disarmament of the ship. It is inconceivable that any foreign power could undertake to investigate by force such a question and to determine for itself the facts and thereupon precipitate a naval engagement in San Francisco Harbor. It is not conceivable that such a practice could be tolerated by the neutral maritime powers. The claim of the Japanese consul of a right personally to inspect the *Lena* was not admitted by the collector of the port, who held, very justly, that such inspection was the business of the United States authorities alone.<sup>1</sup> A belligerent cannot have the right to police all neutral harbors for the purpose of enforcing regulations imposed by those powers. Any such invasion of territorial jurisdiction upon a disputed question of fact would be lamentable in its results, and any rule naturally leading to such consequences should be resisted absolutely on its first appearance.

The *Nation* asks in this connection why all neutral ports should not be closed except to ships in distress. It may be observed that a neutral state does habitually close its landed territory to the forces of a belligerent, and that a like rule applied habitually to neutral ports would greatly limit naval warfare and tend to check the loss and disturbance which it inflicts on neutral commerce. It would strongly tend to localize war and avoid far-reaching complications. The main objection to it, as has been said, is the overwhelming advantage it would give to great colonial powers like Great Britain, having ports in all parts of the world.

Peace being the normal order of things, as Sir John Macdonell has lately said, the disposition of the past forty years has been that the "interest of neutrals should prevail in conflict with those of belligerents,"<sup>2</sup> and the recrudescence of belligerent sentiment which Sir John reports must be abated. Commerce, after all, is the great interest and service of the seas, and war is a minor and temporary affair. The greater interest ought not to yield to the less, except under the most direct necessity.

### *Sinking Neutral Vessels*

The sinking of a neutral ship by a Russian squadron on the ground that she was carrying contraband of war and that it was impossible on account of the weather, lack of coal, and the neighborhood of a Japanese fleet, to bring her in for adjudication, has led to wide and unfavorable criticism.

The ship, the *Knight Commander*, was alleged to be loaded with a cargo of railroad supplies intended for belligerent use by Japan.

<sup>1</sup> New York *Nation*, September 15, 1904.

<sup>2</sup> *Nineteenth Century*, July, 1904.

Her papers were preserved, her officers and crew placed in safety and allowed to attend the condemnation proceedings at Vladivostock. The court there subsequently held such proceedings a basis for condemnation.

The criticism seems to rest on the doctrine often asserted that although a belligerent vessel taken as a prize may be destroyed if it cannot be brought in, yet a neutral vessel so taken must not be destroyed, but if she cannot be brought in, must be allowed to go free, even though carrying contraband.

The contraband articles cannot be taken from the neutral ship for at least two reasons: First, commonly, as in the case of the *Knight Commander's* cargo of railroad supplies, it is physically impossible for the warships to accommodate them. Secondly, the claim always is that the ship and her papers and necessary witnesses must be brought into port as a condition for condemning the cargo. Thus, in the *Trent* affair, where it was claimed that the carrying of Messrs. Mason and Slidell was in the nature of carrying contraband, and that therefore their seizure and removal was warranted, it was successfully answered that until condemned by a proper prize court, a captor has no right to do anything except bring the ship before the court.<sup>1</sup>

This doctrine, that a neutral vessel can never be destroyed before adjudication, seems to rest mainly on the case of the *Felicity*,<sup>2</sup> where Sir W. Scott passed on the subject of an American merchant ship and cargo destroyed by the English cruiser *Endymion* during the war of 1812. The vessel was sailing under British license but mistook her captor for an American warship. She therefore concealed this license. The weather was so boisterous and the vessel so injured that she could not be brought to port, nor could the captor spare a prize crew. She was therefore burned. The court holds, as her license was concealed, she must be treated simply as a belligerent, and that the destruction was legal. It is said, *arguendo* merely, that if she had shown her license she would have been entitled to be treated as a neutral, and Sir William says:

"Where it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice that they require neither reason nor precedent to illustrate or support them."

This remark of an eminent judge seems largely the parent of the rule. It is submitted, with deference, that the rule apparently

<sup>1</sup> Wheaton's *International Law* (ed. 1904), sec. 109 b.

<sup>2</sup> Dodson's *Admiralty*, 381.



sought to be enforced by the Russian authorities and recognized by the Vladivostock court, is more just and reasonable, namely, that if, for good and sufficient cause, such neutral prize cannot be brought in, there is no obligation to allow her to go free, to reinforce the enemy with her cargo, but as a rule of necessity, to prevent the delivery of the cargo, she may be destroyed exactly as a belligerent, the crew and papers being preserved, and the question of prize or no prize being adjudicated as if she had been brought in. It seems too much to expect the other rule to be observed where the cargo is plainly contraband and important to the enemy. The objection by England to the destruction of this ship, *M. de la Peyre* declared recently, does not rest on a solid foundation, and that of the United States, he says, is even less permissible, since during the War of Secession the two parties systematically sank all the prizes.

*M. de la Peyre* is under a mistake. The Federal cruisers habitually brought in and submitted to the prize courts their captures. No such course was open to the Confederate cruisers, since all the ports of the Confederacy were blockaded and the ports of no other country were open to them for such use.

Captain Semmes, of the Confederate cruiser *Alabama*, habitually burned his captures,<sup>1</sup> but he seized only vessels belonging to American citizens and carefully avoided neutral ships or cargoes. His practice is therefore no precedent as to the right to destroy a neutral vessel without condemnation.

His situation was, however, such that if he had the full rights of a belligerent it would seem that he had as a matter of necessity the right to destroy contraband of war even without the intervention of a prize court. Suppose an armed British ship, fitted for belligerent use, had been met on her way to a Federal port, evidently designed for sale and likely to be bought by the Federal Government. Would Captain Semmes have been bound by international law to leave her unmolested since he could not bring her into port for condemnation? The suggestion that such is the law, because of Sir William Scott's *dictum* and the echo of it by the writers, cannot be concurred in.

It must be admitted that a neutral, carrying contraband, is not exposed by that act alone to condemnation of the ship, but Sir William Scott himself recognized that "the ancient practice was otherwise," and said: "It cannot be denied that it was perfectly defensible on every principle of justice."<sup>2</sup> He shows that modern policy has introduced a relaxation on this point, but that circum-

<sup>1</sup> *Records United States and Confederate Navies*, vol. 1, where conduct of both navies is set out at length and in detail, with records and correspondence.

<sup>2</sup> *The Neutralitet*, 3 C. Robinson, 295.



stances of aggravation or misconduct may revive against the ship the ancient penalty.

Justice Story shows that the penalty is applied to the vessel on account of coöperation "in a meditated fraud upon the belligerents by covering up the voyage under false papers and with a false destination."<sup>1</sup> The whole right of seizure and condemnation of neutral contraband is based, as Kent shows from Vattel, on "the law of necessity" and "the principle of self-defense."<sup>2</sup>

Sir W. Scott held that the penalty for carrying dispatches of a belligerent (certainly a more noxious act), must be the condemnation of the neutral ship, and argues that the confiscation of the dispatches would be ridiculous and says: "It becomes absolutely *necessary*, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle."<sup>3</sup> If the courts of Russia, reasoning as boldly as Sir William, Mr. Justice Story, and Chancellor Kent, are allowed to maintain their conclusion from the rules of justice and necessity, their position is by no means untenable.

His Excellency, Count Cassini, the Russian imperial ambassador to the United States, on the 15th of September, 1904, by letter, kindly called the writer's attention to the Russian imperial order of March 27, 1895, which reads as follows:

"In extreme cases, where the retention of ships is impossible, owing to their bad condition, when they are of small value, in danger of capture by the enemy, when at a great distance from a home port, or when there is danger for the ship which has taken the prize, the commander, upon his responsibility, may burn or sink the captured vessel after previously having taken her crew and as far as possible her cargo. Her documents must be preserved and witnesses can be held for the purpose of testimony before the prize court."

His Excellency adds:

"As this last declaration has never been protested by any power, it appears, consequently, that the commander of the Russian man-of-war committed a perfectly lawful act in sinking the British steamer *Knight Commander*, which was undoubtedly carrying contraband of war, as was proven immediately after her being stopped. This was confirmed later on at the trial, when the deposition of the captain was refuted and contradicted by the presented board documents which he supposed to be lost with the ship."

The instructions issued by the Secretary of the Navy of the United States in 1898 to blockading vessels and cruisers, and prepared by the Department of State, strongly resemble those of Russia.

<sup>1</sup> *Carrington v. Merchants Ins. Co.*, 8 Peters, 495.

<sup>2</sup> *Seton v. Low*, 1 Johns. Cases, 1.

<sup>3</sup> *The Atlanta*, 6 C. Robinson, 440.

They are as follows:

"28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this cannot be done, *they may be destroyed*. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered."

It is to be observed that the language is general, applicable to neutral as well as belligerent vessels, and it is believed it in a measure supports the Russian contention.

It is submitted that this rule and the Russian practice are entirely reasonable and in accordance with the necessities of maritime war and that they are, therefore, able to impair the authority of a *dictum* even from so eminent an admiralty judge as Sir W. Scott.

The result of this inadequate discussion of these several problems in international law (a few of the many lately mooted) is a humiliating sense of the uncertainty, confusion, and conflict which still attend the maritime rights of neutrals in the time of war. One is forced almost to acquiesce in M. de la Peyre's recent statement that maritime international law does not exist.<sup>1</sup>

It certainly shows the great necessity of an authoritative international conference to discuss, define, and establish the rights and duties of neutral commerce in time of war. Now that the vast and complicated machinery of war is of such desolating destruction, it is more true even than a generation ago, when the late Mr. Lecky so convincingly proclaimed it, that the rich nations are the potent ones in war, as in a ruder age they were not. It is true, too, that the very riches which enable them to support, powerfully persuade them to avoid, war. These great commercial powers possess the seas with their beneficent adventures, and they must strive to keep the peace on those great highways of all the nations, and the ships that bear the means of life must be considered as of interest and human claim equal and paramount to those designed to inflict death.

<sup>1</sup> *Questions diplomatiques et coloniales*, August 1, 1904, p. 185.

# THE JURIDICAL NATURE OF THE RELATIONS BETWEEN AUSTRIA AND HUNGARY

BY COUNT ALBERT APPONYI

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I INTEND to put before you a brief account of the juridical nature of our connection with Austria. In doing so I must apologize for such defects in my address as will arise from the absence of those scientific sources which I should have been glad to have consulted even on a subject so familiar to me as this one is. When I left Europe I had no idea of being honored by a call to address an audience of American jurists. I am, therefore, totally unprovided with scientific materials and must merely rely on my memory which, however, will hardly fail me on this subject in anything essential. For more than thirty years of parliamentary life it has been constantly in my mind; on no other topic have I bestowed so much time and attention. It is not my intention, however, to trouble you with my personal opinion on any controversial matter; I mean to state nothing but fact, law, and what is the common creed of all my countrymen without distinction of party.

The relations between Austria and Hungary seem to be such a network of intricacies to foreign observers that very few of them care to get to the bottom of the matter. In fact, the great difficulty which is experienced in mastering this problem arises not so much from its own nature as from the prevalence of certain false general notions and misleading comparisons. The most widespread fundamental error, the *Πρωτον ψεδός* as I should like to call it, consists in considering an Austrian Empire, which is understood to contain Hungary, as the primordial fact, and whatever is known of Hungarian independence as a sort of provincial autonomy conceded to that "turbulent province" by the central power of the Empire. Austrian court politicians and some German writers have done their best — or rather their worst — to propagate this theory, which, however, is radically false, and being almost daily contradicted by facts, engenders hopeless confusion in the minds of all who choose to be guided by it. The truth is the exact counterpart of the above-quoted proposition; in truth, historical, legal, and material, the primordial fact is an independent Kingdom of Hungary, which has

allied itself for certain purposes and under certain conditions to the equally independent and distinct Empire of Austria, by an act of sovereign free will, without having ever abdicated the smallest particle of its sovereignty as an independent nation, though it has consented to exercise a small part of its governmental functions through executive organs common with Austria. If the term of "concession" is to be used at all, it is Hungary who has granted some concessions, by concurring in the creation of such common organs of government; she had none to ask for, as there is no earthly power placed above her entitled to control her, and as she is possessor of all the attributes of a sovereign nation. That Austrian Europe which is supposed to include Hungary has no existence except in false theory and in former oppressive practice; in public law it always was and now in fact is a nonentity. Even the term "Austro-Hungarian Empire" — what the German calls *Das Reich* — is a false one; and the officially used term "Austro-Hungarian Monarchy" (not a very happy because a misleading one) can be accepted, as we shall see, only in the sense of their personal union under a monarch, physically one, but representing two distinct personalities of public law, the Emperor and the King, and of their joint action in questions of peace and war; but an objectively unified body containing both Hungary and Austria does not exist.

From the moment you have well grasped these fundamental truths, on which no Hungarian even admits discussion, it is like a falling of scales from your eyes, and everything at once becomes clear and all facts are easily accounted for. To bring them into full evidence I must trouble my hearers with some briefly sketched peculiarities of our constitutional development and with a short outline of the events which brought about and shaped our connection with Austria.

## I

The Hungarian constitution is as old as the Hungarian nation herself, at least as old as anything history knows of her. No written document exists which could be called the Hungarian constitution; no illustrious lawgiver or set of lawgivers is entitled to the praise of having framed her. She is the product of organic evolution, worked out through centuries by the genius of the nation, in uninterrupted continuity; her principles and rules must be collected from numbers of laws, customs, and precedents, reaching as far back as the eleventh century. In this respect there is an analogy between the growth of the English and of the Hungarian constitution, which is the more striking because the two racial individualities are as dissimilar as they well could be, and because there is no trace of mutual influence in their development. Even some dates happen

to coincide. In 1222, seven years after the Magna Charta, appeared the Golden Bull of our King Andrew II, which, like the older British document, laid no claim to being considered as a new enactment, but was meant to be a confirmation of old liberties. The legal distinction between constitution and law, that chief feature of American institutions, is unknown to Hungarian public law. It is within the power of our legislature to effect constitutional changes through simple legislative acts, just as she can alter a tariff or legislate on railway matters. In fact, the strongest conservatism prevails in dealing with constitutional questions, and that compound of time-hallowed prescriptions which bears the collective name of constitution is cherished with a respect nowhere to be surpassed. Some aspects of our constitutional growth will be placed now before this distinguished audience preparatory to the subject proper of my present address.

From the day when our forefathers were converted to Christianity (at the end of the tenth century) we find at the head of the nation a king with a vast prerogative, which it was necessary to invest him with, because the constant dangers threatening our country from the west as well as from the east could be faced only by a strenuous concentration of power. But that prerogative was subjected from the beginning to several checks. There was the national assembly — the gathering of all freemen — soon to evolve into national representation, the assent of which was needed to give permanent force to royal enactments, and which became an openly recognized and organized factor of legislative power in the second part of the thirteenth century. There was the semi-elective character of the Crown which, though vested in a reigning dynasty, could be transferred by election to any member of that dynasty, making it advisable for the King to conciliate public opinion if he wished to insure succession to his son. There was, moreover, that remarkable clause of the Golden Bull, which remained in effect till 1686, conferring in so many words on the Estates of the realm a right of resistance to the King should he infringe their liberties. There are two laws more remarkable still, considering their date, which are 1235 and 1298, enacting, the first of them, that the Palatine (head of the King's Government) should be dismissed on a vote of the National Assembly adverse to his administration, while the second one states that no royal ordinance should take legal effect if not signed by certain dignitaries designated by the National Assembly. In what other country do we find at so early a date such full-grown elements of parliamentary government?

Medieval Hungary could reach such a high state of constitutional development for the same reason as made the power of Hungarian Kings the most efficient one of that epoch, and that reason was the



absence of feudalism. No doubt, infiltrations of feudalism, as prevalent throughout Europe, are to be found in our old institutions, but as an accidental intermixture only, not as their essence and chief feature. That blending of public prerogative with rights belonging to the sphere of private law, which is the essence of feudalism, never prevailed in the organization of our public powers, never broke their action on the nation as a whole. To this early prevalence of public law in the government of the country do we owe not only a superior efficiency, not detrimental to liberty, of our public powers, but in connection with it an early growth of conscious national unity, of patriotism on broad lines, at a time when tribal feeling and feudal allegiance subdivided all European nations into small units which paralyzed each other, and into a corresponding fractional mentality adverse to the very idea of state and to national feeling. But for this happy peculiarity of her old institutions Hungary could never have been able to hold her own against scheming neighbors of tenfold her material power.

In 1686 the Hungarian Crown became hereditary; henceforth, she missed the guarantee contained in free election; but in the mean time some substitute for it had grown up in the institution of coronation and the legislative acts by which that august ceremony is attended. Old laws require the heir to the throne to get himself crowned within six months of his accession and they suspend some important part of his prerogative (we name only his participation in legislative power) till he has done so. But crowned he can be only with the assent, or, to state it more correctly still, through the agency of the national representation, which puts thereon such conditions as it thinks necessary. Every coronation, then, is founded on a new agreement between king and nation, embodied in a document called "inaugural diploma" and accompanied by a solemn oath of the King to observe the terms of that document and the general enactments of the constitution. By these proceedings the fundamental principle of our institutions, the principle that every power, the prerogative of our Kings included, has its source in the nation, and comes to those in whom it is vested through delegation from the nation, is constantly reasserted and held in evidence; it is the nation which crowns the King, under the sanction of God's most holy Majesty; the prerogative of the King, his very title to reign, is blended into one with popular rights and their guarantees; both together, prerogative and people's right, are designated in their joint force and sacredness by the name of "the holy Hungarian Crown," of which every Hungarian citizen is a member, this membership not being a mere metaphor, but implying the great principle that there is no difference as to inviolability and sacredness between the King's exalted prerogative and the poorest subject's

individual and public rights, and that there is no prerogative apart from or in opposition to the nation.

I have insisted at some length on the peculiar character of the Hungarian monarchy because it contains the most distinctive feature of our constitution and may be considered as the masterpiece of that political genius in which few nations, if any, have surpassed our people. Placed in a situation where a strong executive was essential to national safety, our forefathers had to solve the problem to make prerogative as efficient as could be for its national mission, and at the same time innocuous to liberty. And either I am totally misled by patriotic self-conceit, or that difficult problem found a better solution in Hungary than in any other country placed in similar circumstances.

Time fails me to expatiate on the development of the other constitutional powers, to show how national assemblies (originally mass meetings of all freemen) evolved into representative bodies; how these bodies grew gradually stronger and extended the sphere of their rights; how a powerful organism of county, town, and city self-government was developed on quite original principles, and became in hard times an unconquerable stronghold of national liberty. But a few words must be said as to the question: Whom do we refer to by the name of the Hungarian people? In other words, In whom were all those rights vested which formed the popular branch of the constitution?

To an American — now, even to a modern European — audience, such a question may seem preposterous. In whom, indeed, should popular rights be vested but in the whole people, including every citizen of the country? But we are considering now a medieval constitution, and a political establishment founded on conquest; which means that we speak of an epoch which knew liberty only in the form of privilege and of circumstances peculiarly adverse to universal equality.

Now, and this is one of the most important facts in our history, privilege in a racial sense never existed in Hungary. When our forefathers conquered their new home, they found different races on its soil, and as late as the eighteenth century, immigration brought new racial intermixture into our country. How, then, did we deal with that mass of heterogeneous elements? National unity — just like concentration of power — was, and still is, essential to the permanence of any political establishment in that part of Europe, which has to face the first onset of all eastern dangers; that there should exist a strong national unity on that particular spot was, and is even, a condition of safety to all occidental Europe. But how was it to be effected among a chaotic mass of racial individuality? History of conquest shows two typical ways of solving that problem.

In almost all states founded in Western Europe by invaders of Teutonic origin, a new race grew out of the fusion between conqueror and conquered, the racial individuality of the latter generally prevailing. So the Franks, the Visigoths, the Longobards became Latin in France, Spain, and Italy; the Normans, Latinized in France, became Saxon after the conquest of England. Turkish conquest on the other hand, being founded on theocratic principles, does not tend to racial assimilation; it simply lays a new racial stratum on the old ones, granting the latter a sort of contemptuous toleration, but domineering over them with all the might of religious and political exclusiveness. Our forefathers adopted neither of these two courses. They kept their own race unaltered, and respected the racial individuality of the conquered as well as of later immigrants; but they absorbed them into political unity by conferring upon the deserving among them all the privileges of a Hungarian freeman, privileges which, on the other hand, were forfeited by many members of the conquering race. By these proceedings — which remind us of ancient Rome, conferring her citizen right on provincials — racial difference soon disappeared from public law, every man on our territory being subjected to the same laws, enjoying the same capacities of public life, being equally able to become an active agent in national evolution, but disabled from evolving any sort of particular racial history; being in a word tied to the whole community by every material and moral tie which, in the course of time, engenders feelings of solidarity and union. National unity, the unity of the great political Hungarian nation, was effected on the most liberal base, and towers up to our days in unconquerable height and strength above those abortive attempts to foment discord on the ground of misguided racial instinct, of which you may have heard some rumors even here, among part of our immigrants. From the beginning, then, of the Christian Era in our country, that is, for nine hundred years, the rights of the people have been vested in the whole undividable Hungarian political nation, irrespective of racial distinctions.

But class divisions and class privileges, Hungary, like all medieval Europe, has certainly known. Still, I can claim a certain kinship to democracy on behalf of our old constitution.

When medieval Hungarian public law had reached maturity, there was a class of *nobiles* — which term would be very inaccurately translated into the English word “noblemen” — I should rather call them “freemen,” or “franchise-men,” in whom all public rights were vested. To these the clergy, the members of some other liberal professions, and the burgesses of a great number of towns became assimilated. Access to that privileged class was easy; it numbered many thousand members, whose social status did not

differ from that of the peasantry; sometimes the peasantry of whole counties became enfranchised by one single act of prerogative or of legislation. Gradually it became so numerous that the number of our franchise-men in the eighteenth century — and probably at an earlier date, too, but of this we have no statistics — was comparatively larger than the French electorate under Louis Philippe and perhaps even the English one before the great parliamentary reform of 1830.<sup>1</sup> Within that large body of privileged citizens, so large as to bear a distinctly popular stamp, there was no further class distinction. And this is the most characteristic fact in our old constitution; it is the fact which chiefly warrants me in calling that constitution quasi-democratic. There existed, of course, vast differences of wealth and of social influence (I suppose even modern America knows something of the kind), but legally recognized and fixed subdivisions of privilege there were none. It was only in much later time, under the Hapsburg kings, that German titles were bestowed on Hungarian nobles, and that an hereditary aristocracy sprang up and began to sit in an Upper House, which was legally recognized in 1608; originally, the national representatives consisted of one House only, which might not unfittingly be compared to the English Commons. And so, while in England the Lords were foremost in seizing upon some part of public power and the Commons slowly and gradually followed to the front, in Hungary, what we may call the Commons were powerful from the beginning, and no such thing as Lords existed till, at a much later date, that institution was to some extent imported from without. Where England beats us, as it beats the greatest part of our Continent, is the early growth of a free peasantry; but then she has almost wholly lost that most valuable class, while we have kept it in full vigor and look to it as an inexhaustible source of national strength.

The reign of privilege certainly took its mildest form in Hungary; true, it lasted longer than most in other countries. It was ultimately abolished by the glorious legislation of 1848, which has been effected through no uprising or agitation among the disfranchised people, who persisted in perfect political apathy, but through a spontaneous resolve of the privileged class itself. Class magnanimity is a feature unknown to general history; that we can show a sample of it in our annals is perhaps the proudest, certainly the purest, glory of our nation.

<sup>1</sup> Since he delivered this address, the author has been enabled to add a few figures which make good the above statements. At the epoch of the French Revolution we find in Hungary 75,000 families (corresponding to 325,000 individuals) belonging to the privileged class, out of a total population of 6,000,000, while at the same time France numbered only 28,000 such families against a population of 26,000,000. In 1805 we find 340,000 "nobles" (or as we call them freemen) against a total population of 7,500,000; in 1848 they numbered 675,000 out of nearly 12,000,000. But to these numbers must be added the clergy (numbering by itself 16,000 voters in 1805), the members of other enfranchised liberal professions, and the burghesses of privileged cities.



And here my digression to the field of general constitutional history must be stopped;<sup>1</sup> enough has been said to bring into evidence the peculiar nature, the originality of our institutions, and to enable my hearers to draw inferences as to the vigorous individuality of the people whose national genius has created those institutions. That such a national individuality can hardly be absorbed into an artificial political settlement, that independence is the very law of her nature, seems to be the clear result of even so much insight into the workshop of her historical evolution. Thus prepared, we can now consider the problem which is to be the subject of my present address with a clearer perception of its constitutive elements.

## II

The Austrian dynasty, the dynasty of Hapsburg, was called to the Hungarian throne in 1526, after the disastrous battle of Mohacs, in which the Turks annihilated the military force of Hungary. It was the epoch of Charles V, that Emperor of Germany and King of Spain who boasted that in his domains the sun never set. His brother Ferdinand was elected King of Hungary in the hope that the power of this mighty dynasty would assist us against the Turks. But not only was there no intention of melting the old Kingdom of Hungary into the Austrian domains, but the election and coronation of Ferdinand took place on the express condition that the independence of the Hungarian Crown and the constitution of the realm should remain unimpaired. That condition was accepted and sworn to by the new king; it has been confirmed by the coronation oaths of all his successors belonging to the same dynasty; whatever practical encroachments may have occurred, this legal state of things never became altered.

During the first period of the Hapsburg rule in Hungary, which period extends to the year 1723, no sort of juridical tie was formed between her and the other domains of the dynasty, which, to simplify matters, we shall henceforth call by their later collective name, Austria. It was even impossible that such a tie should exist, because Hungary remained the semi-elective kingdom she had been, while those other domains were hereditary possessions. The connection was at this time a merely casual one, like that which existed for some time between England and Hanover.

Matters took a different aspect when hereditary right to the Hungarian Crown was conferred on the Hapsburg dynasty, first on

<sup>1</sup> To those readers who wish for ampler information on this matter, the author recommends Professor Akos v. Timon's most valuable history of Hungarian law, published this year in a very good German translation. The German title of the book is *Ungarische Verfassungs und Rechtsgeschichte*, von Akos v. Timon. (Berlin, 1904: Puttkammer und Mühlbrecht.)



its male lineage (1686), and afterwards on the feminine descendants, too, in 1723. This was effected through the celebrated transaction known to history as the Pragmatic Sanction of Emperor Charles VI (Charles III as King of Hungary), which, being the basis on which our present relation to Austria rests, has to be considered here with some accuracy.

The Pragmatic Sanction consists of several instruments, diplomatic and legislative, of which the Hungarian Law I, II, and III of 1723 alone has legal value and practical importance for Hungary. In that law the legislature of the realm settled the question of succession to the Hungarian throne in accordance with King Charles III's wishes by the following enactments:

1. Hereditary right to reign as kings in Hungary is confirmed to the male and female descendants of the Kings Leopold I, Joseph I, and Charles III in conformity with the law of primogeniture already in vogue in the Austrian domains, to the effect that as long as the above-mentioned lineage lasts, the same physical person must infallibly reign in both countries, Hungary and Austria, with no legal possibility of division (*inseparabiliter ac indivisibiliter possidenda* are the words of the law). The other collateral branches of the Austrian house have no right to succession in Hungary, though they may be possessed of it in Austria.

2. Notwithstanding that personal union, the independence of the Hungarian Crown and the old liberties of the kingdom are solemnly recognized and reasserted.

3. When the above-described lineage becomes extinct, Hungary will use again her ancient right of free election to the throne, irrespective of what Austria, or any part of Austria, may choose to do in that emergency.

4. As long as this lineage lasts and the same physical person reigns in both countries, Hungary and Austria are bound to assist each other against foreign aggression.

On analyzing this fundamental transaction we must take notice of its contents and of its form.

In the contents there is nothing to take away any particle of Hungary's independence and national sovereignty. A personal tie is formed, it is true, with another country. I call it personal because it lasts only as long as a certain set of persons, a certain lineage, exists and becomes *ipso facto* severed whenever those persons disappear. But that personal tie, the identity of the ruler, does not affect the juridical independence of the country, because that identity exists only with respect to the physical person, while the personality of the King of Hungary remains quite as distinct in public law from the personality of the Austrian ruler as it had been before; as King of Hungary that monarch, physically one, is possessed of the preroga-

tive, checked and controlled by the nation, which we have already considered in its chief outlines; as ruler in Austria he wields — or wielded at that time — a power almost absolute, grown of a combination of feudal and Roman law, both unknown in Hungary. There is no possibility of melting into one these two prerogatives so widely different in origin and character. To that personal tie, which only means that two different and distinct prerogatives are vested in the same physical person, a solemn league and covenant was added, a mutual obligation to assist each other against foreign aggression.<sup>1</sup> Is there anything in the nature of such a covenant which should of necessity impair the independence of the nations who are parties to it? That, now, depends wholly on the form of the transaction, on the sources from which it derives its binding character, on the forces which insure its execution. Should that obligation to mutual defense have been laid upon Hungary by a power outside of her own public powers and superior to them, or should there be any sort of such superior legal organization able to enforce its execution against Hungary's free will or to interpret its meaning in a way binding upon her, then, indeed, Hungary would be no more a sovereign nation. But of all this there is not even a trace. Hungary entered that compact of mutual defense by an act of her sovereign will, *and its execution as well as its interpretation* — let me emphasize this point, because it absolutely settles the question — *depends entirely on her good faith and on her discretion.* Neither before, nor in, nor after the solemn transaction called "Pragmatic Sanction" will anybody be able to discover even the trace of some power superior to the public powers of Hungary, entitled to control her, able to force on her what she does not choose to accept or to do. Now this way of entering and of keeping compacts exactly answers to the idea of national sovereignty. We shall see later on that these characteristic features of our legal status suffered no alteration whatever through more recent transactions.

To give more weight to the present comments on the Pragmatic Sanction I shall quote its authentic interpretation given in a law enacted by the Hungarian legislature in 1791, after an attempt of Joseph II to subvert the constitution. In Hungary, as in England, laws of this kind, reasserting and putting into evidence national or popular rights, generally follow practical encroachments on those rights; their purpose is not to create but to declare law; to this family of declaratory laws, the most celebrated scions of which are

<sup>1</sup> It is generally admitted that the Pragmatic Sanction, with all its enactments, has the character of a bilateral compact between the Hungarian nation and the reigning dynasty. Most authorities of public law hold it to be at the same time a compact between Hungary and Austria, the latter having been represented on its conclusion by her (then) absolute ruler. But as this is controversial matter, the author, though holding the first-mentioned opinion, did not think fit to insist upon it in the text; his argument holds good on either supposition.

the Magna Charta, the Bill of Rights, the Petition of Rights, — to that same family belongs the law which I am about to quote:

“ Law I of the year 1790–1791, Emperor and King Leopold II, Article 10.

“ On the humble proposal of the estates and orders of the realm, his most holy Majesty has been pleased to recognize:

“ That, though the succession of the feminine branch of the Austrian house, decreed in Hungary and her annexed parts by the Laws I and II of 1723, belongs, according to the fixed order of succession and in indivisible and inseparable possession, to the same prince whose it is in the other kingdoms and hereditary domains, situated in or out of Germany; *Hungary with her annexed parts is none the less a free and independent kingdom concerning her whole form of rule (including therein every branch of administration), which means submitted to no other kingdom or people, but possessed of her own consistence and constitution;* therefore, she must be ruled by her hereditary and crowned kings; consequently by his most holy Majesty too, and by his successors, according to her own laws and customs, and not after the example of other provinces, as is already enacted by the Laws III, 1715; VIII and XI, 1741.”

The clear and forcible language of this fundamental law requires no additional explanation. We must now only inquire into the nature of later transactions, and see how they bear on our problem.

And here we are first brought face to face with a fact which, though irrelevant in itself, has wrought much confusion, and is still a rich source of misunderstandings. I mean the assumption, in the year 1804, of the title of “ Emperor of Austria ” by Francis I, when the “ Holy Roman Empire of German Nationality ” had collapsed. Many people think that this imperial title extends over all his Majesty’s domains, Hungary included, and that it represents a collective sovereignty superior to that of the Hungarian Crown. The corresponding territorial idea is that of an Austrian Empire, including Hungary. Now, these conceptions are absolutely false. The new imperial title has nothing whatever to do with Hungary, it has legal existence only with respect to those other domains which, from that date, can be properly called Austria, to the exclusion of the Kingdom of Hungary. As ruler of those other domains his Majesty may call himself whatever he pleases, but in Hungary the King alone reigns, and never will the time-hallowed majesty of our old Crown be melted into the splendors of a brand-new imperial diadem, never will it be controlled by any fancied superior power. Hungary never suffered mediatization, no act of her legislative body points that way, and no act of prerogative can achieve it. The title of “ Emperor ” is simply a collective designation for the portion of sovereignty enjoyed by his Majesty in his other domains; in Hun-

gary he is merely King; the two titles, imperial and royal, are distinct and equal in dignity; they designate (as my hearers will remember) two widely different prerogatives, the mixture of which is hardly conceivable even in juridical fiction. It is quite as absurd to think of the Emperor of Austria as ruler of Hungary as it would be absurd to fancy the King of Hungary as reigning in Austria or any part of her. To our public law the Emperor of Austria is a foreign sovereign.

The next striking fact is the above-mentioned legislation of 1848, which, by giving precise shape to parliamentary government in Hungary, and by making every act of royal prerogative dependent in its legal value on the signature of Hungarian constitutional advisers, made the distinctness and diversity of the two juridical personalities meeting in one physical person, the Emperor's and the King's, and of the two prerogatives vested in that same person, evident to all eyes. From an abstract truth, often obscured by the practice of a system of personal government not very anxious to uphold it, this distinction became a living reality, no more to be ignored. The winning of such a practical guarantee to our national independence is, besides the democratic reform which it has effected, the immortal glory of that legislation.

War, victorious at first, disastrous after the crushing intervention of Russia, came next, followed by a period of absolute oppression which lasted from 1849 till 1867. But all this belongs to the domain of mere fact; it did in no way alter the legal continuity of the principles on which our connection with Austria rests; it did not weaken in right the independence of the Hungarian Kingdom, though suspending it in fact for a time. There had been times of oppression, almost as hard as this one, before; at such times Hungary, while powerless to prevail against superior material forces, had always stuck to legal continuity, waiting patiently until a turning of the tide should enable her to bring practical reality in concordance with juridical truth; but of that juridical truth she never gave up one single atom, and she always lived to see it prevail against wholesale oppression as well as against partial encroachments. 1867 was the year of one of these resurrections; at the same time, it created new rules concerning the practice of our connection with Austria, rules which, however, left the principle of that connection — the independence of Hungary as a sovereign nation — unaltered, as a rapid survey of them will show.

### III

The celebrated transaction called the Compromise of 1867 is embodied in the Law XII of that year. In its first (declaratory)



part this law fixes again the sense of the Pragmatic Sanction, as stated above, emphasizing its two principles: our sovereign national independence and the mutual obligation to mutual defense with Austria. Then it proceeds to state that the fact of Austria's having been endowed with a constitution which gives to her people a right of controlling their government (as we control ours) makes some new provision necessary in those branches of administration which bear direct relation to mutual defense, and in which it is, therefore, to say the least, highly desirable that the joint action of both countries should be unfailingly secured. To that end, the two great agencies of national defense — foreign affairs and war-administration — are to a certain extent declared common affairs, but in the executive sphere only, where action originates. Legislation on them (such as assenting to international treaties, framing of laws on the conditions of military service, on recruiting, etc.) is expressly reserved to the juridically independent action of both legislatures, which are, however, desired to do their best to agree on these matters. To provide for these common affairs a common ministry of foreign affairs and of war<sup>1</sup> are called into existence; the expenses of these two departments are jointly to be borne by both countries in proportion to their comparative financial power — measured until now by the results of taxation of each. Both countries have equal control over these common departments, a control which they can exert through ways direct and indirect, as we shall see later on.

The common ministry of foreign affairs implies a common diplomatic service. It is not so clear up to what point unity of the armed force is implied in common war administration. Our law mentions a Hungarian army as part of the whole army, which is to be unitedly commanded and regulated as to its inner organization by the King, in the exercise of his constitutional prerogative. The somewhat oracular terms of this proviso have given birth to much controversy and to some trouble lately. But one fact towers above all controversy, namely, the fact that in public law the individuality of the Hungarian army has been expressly maintained; and this is all that need be said about the matter here, where we are considering the juridical aspect of things only.

Particular provision has been made for the annual vote on common, foreign and war, expenses and for a direct parliamentary control over the respective common ministries. Anything like a common

<sup>1</sup> I did not mention in the text the third common ministry, that of finance, because that high-sounding title is only apt to generate confusion. In fact, the common minister of finance has nothing to do at all with finance in the sense of a financial policy; he is merely a cashier who receives the contributions of Austria and of Hungary to common expenses and hands them over to the respective common departments. It is merely accidental that the common minister of finance is now generally intrusted with the government of Bosnia and Herzegovina.



parliamentary body being out of question, the most natural proceeding would consist in submitting these questions to both parliaments; but practical difficulties might arise if their votes should differ; how could two great parliamentary bodies residing in two different countries come to an agreement as quickly as the necessities of immediate action may sometimes require? To meet this practical difficulty select committees are annually chosen by both parliaments to the number of sixty members each, called delegations, and holding their annual meeting at the call of the Emperor and of the King, alternately at Vienna and at Budapest. The delegations don't sit together; they are two separate bodies, like the mother assemblies, only more handy ones to adjust difficulties. In case of disagreement they communicate through written messages, and only when it seems impossible to settle differences through correspondence (a very rare occurrence) do they meet for a simultaneous vote, at which meeting no discussion can take place. What is then the juridical meaning of that simultaneous vote? Is it to get a joint majority out of both bodies? That would contradict the fundamental principle of the institution, which is no sort of common parliament but only a channel of easier communication between the two parliaments; the real meaning of that somewhat anomalous expedient is simply to bring face to face the two dissentient national wills and to make the more fixed one of them prevail when joint action must be secured one way or other.

The only functions of the delegations are to fix the figures of the budget of both common departments and to bring the controlling power of both parliaments over these departments into direct action. The figures as fixed by them are incorporated into the Austrian and into the Hungarian budgets. The ratifying vote of the Hungarian parliament is an essential condition of legal value to their resolutions, and, though the parliaments cannot alter them, the Hungarian parliament at least has power altogether to reject any decision of the delegations when it thinks that the latter have gone beyond their constitutional competence. It must ever be borne in mind that the delegations are after all but select committees of parliament, committees endowed with some privileges, but still committees controlled and kept within their limits by the superior power of the mother assemblies.

Parliaments, the Hungarian parliament, at least, for the Austrian law gives greater power to the Austrian delegation than our law bestows on the Hungarian one, have, as I already hinted, indirect means, besides the direct one, of controlling the common departments. Law and custom desire the administration of common affairs, though intrusted to common ministers, to remain, as to its leading principles, in constant agreement with the Hungarian

ministry; the latter is, therefore, co-responsible for the general conduct of foreign and war affairs to the Hungarian parliament, which may give an adverse vote on any question touching those departments. Such a vote, though affecting directly the Hungarian ministry only, would most certainly have an indirect bearing on the position of the respective common minister, or on his policy. This indirect influence of our parliament puts it into still clearer evidence how the common affairs and the common executive agents are anything rather than representatives of a power higher than the public powers of Hungary; they are, on the contrary, constantly controlled by these powers and, as we shall see more clearly still, entirely dependent on them.

Several other enactments of the Law XII, 1867, which express the advisability for Austria and Hungary to agree on some matters not exactly belonging to the sphere of mutual defense,<sup>1</sup> I pass by here, because, being entirely facultative in their execution, they can have no possible bearing on the juridical aspects of national independence. But it is now my task to analyze the institutions created in 1867, and to inquire whether they have impaired Hungary's independence as a sovereign nation, the maintenance of which we have followed out up to that memorable date.

That there is mutual dependence, in the political sense of the word, between two nations which are bound to act together in certain affairs and have created institutions to secure such identity of action, seems perfectly clear. Mutual dependence of this kind certainly exists between Hungary and Austria; we have a strong party in Hungary which objects even to this, and calls itself, on that account, the party of independence. But with this political aspect of the question I have here nothing to do. Mutual dependence between two equals depending on the free will of both does not affect their independent juridical individuality, in the case of a nation this nation's sovereignty. That would be impaired only should the nation be incorporated as a part into some larger body, or controlled by some legal power superior to her own public powers. Now, is this the case of Hungary since 1867?

The question put in these terms is negatived by the very nature of the transaction which we are examining. We call it a compromise and such it is politically speaking. Hungary, before creating the Law XII, 1867, ascertained in a proper way that it would settle the difficulties pending with the dynasty and with Austria,

<sup>1</sup> The most important of these enactments is one which provides for customary union to be periodically established. It is far from improbable that in a few years that union will be dissolved and a commercial barrier rise between Hungary and Austria. Nor will this modification of their economic relation juridically affect the connection as established by the Pragmatic Sanction and shaped out by the law of 1867.

as common good sense required her to do. But as to *its binding force* this celebrated law is no treaty, like the Pragmatic Sanction, but simply a law like any other law, liable to be abolished or changed at Hungary's uncontrolled pleasure. It is immaterial for the purposes of our present investigation that we should certainly think the matter twice over before tampering with that particular law: that is the *political* aspect of the question; *legally* the whole machinery of common affairs and common ministries can be destroyed by an independent act of the Hungarian legislature, with which nobody has a right to interfere. Now, I ask, how can institutions which depend in their very existence on the sovereign will of Hungary represent a power superior to her, or controlling her? They are not even a new tie between Austria and Hungary, for the simple reason that Hungary is not tied by them. Matters are left, then, exactly as they stood after the Pragmatic Sanction; an independent and sovereign Hungarian nation has entered into personal union with Austria, and both countries are bound by solemn compact to assist each other against foreign aggression.<sup>1</sup>

Though this settles the question, let us consider the common institutions in their activity, and let us inquire whether they represent while existing some fragment, at least, of an imperial establishment, of that *Reichsgedanke* which certain Austrian and German authors are striving hard to discover in them; an establishment including both Hungary and Austria, superior to their public powers, and, let us say, provisionally controlling them to a certain extent. What constitutive elements of such an establishment can be found in the machinery set up by the legislation of 1867? in what does that fancied empire really consist?

It has no territory; there is a Hungarian territory and an Austrian territory; Austro-Hungarian territory there is none, as has been declared by a resolution of parliament, when dealing with an inaccurately worded international treaty.

It has no citizens; there are Hungarian citizens and there are Austrian citizens, the rights of the two citizens being not only distinct, but widely different in the legal conditions of acquiring and losing them.

It has no legislative power; we have seen that even in common affairs legislative acts are expressly reserved to both legislatures;

<sup>1</sup> The author lays no particular stress on the much-debated question whether the union between Austria and Hungary is to be called a personal or a real union, because he considers this as a question of terminology rather than as one of real consequence. In concordance with Fr. Déak he calls it a personal union with an additional covenant of mutual defense, because the *principle of the union is merely personal*; it is, as we have seen, *ipso jure* dissolved, when a certain set of persons (the lineage entitled to succession in both countries) becomes extinct. The really important aspect of the question lies in the fundamental juridical fact that the independence and sovereignty of the Kingdom of Hungary remains unimpaired in that union.

we have further seen that the delegations have no legislative power, and are, even in the sphere of their competence, nothing like *Reichsvertretungen*, "imperial representative assemblies," as the said authors sometimes like to call them, but simply select committees of both parliaments, called into existence for purposes of easier communication between them, and working under their constant control.

It has no judiciary; questions arising between the two countries must be settled, if agreement is impossible, by international arbitration, as was done in a boundary question two years ago.

But it seems to have, and there our opponents exult, at least an executive. What are the common ministers if not some embodiment of a common, of an imperial, executive power? I own to standing aghast at such a profundity of knowledge. Common ministers, then, should represent a common, an imperial, executive power; now, let us overlook the queer aspect of an empire-like settlement, possessed of no other attribution, no other public power but of an executive; let us overlook the little hand-trick which must be performed imperceptibly to glide from "common," which supposes two parties at least, into "imperial," which means one; and let us simply state that even a common executive power does not exist, cannot exist, between Hungary and Austria. There are common ministers indeed, but in what constitution of the world is executive power vested in ministries? We find it everywhere among the constitutional attributes of the first magistrate, subject to more or less restrictions, but vested in him, having its real existence personified by him, ministers being merely his agents, though they may be necessary agents, agents designated by the constitution. In Hungary, executive power is vested in the King; in Austria, in the Emperor; now, as we have seen, the King of Hungary and the Emperor of Austria, though meeting in one physical person, are two distinct personalities in public law, every part of their prerogative being distinct and generally different. The King of Hungary can only be invested with the executive power of Hungary, the Emperor of Austria with the executive power of Austria; no third personality of public law, no sort of imperial first magistrateship has ever been conferred on his Majesty, nor does such a personality, I presume, evolve out of nothing by a sort of *generatio equivoca*, spontaneous growth. So there exists no person in whom such common, or imperial, executive power could possibly be vested, just as there is no source from which it could be derived, even to float in the air. What are, then, our common ministers? They are simply common agents, agents of both executive powers, Hungarian and Austrian; for those branches of government in which both executives should act together, they are ministers of the Emperor and of the King, to



assist his Majesty in those acts through which he simultaneously exercises both his executive prerogatives, imperial and royal.

And let me emphasize again that the whole machinery of common affairs and common ministries must act in constant agreement with the Hungarian ministry, under the constant control (direct and indirect) of the Hungarian parliament (and Austrian, of course, too), that it can be blown up every moment by a short law enacted by the Hungarian legislature; and let me ask again, where can you find in those institutions, dependent on the public powers of Hungary in every moment of their action, in every second of their existence, even the shadow of an imperial establishment superior to Hungary, controlling her to any extent? Truly, that phantom of an "Austrian Empire," taken in the sense in which it should include Hungary, reminds me of the old German proverb about a knife without a blade, the handle of which was missing.

#### IV

Should I have succeeded in making all this as clear to you, gentlemen, as it seems evident to me, you will quite naturally ask me how truths so evident came to be obscured and contrary impressions to be almost generally prevalent throughout the world, and you may further inquire about the bearing of such a connection between Hungary and Austria, as between two sovereign nations, on the international situation of either of them separately or of both taken jointly. Of these two questions I shall try to answer the second one first.

That Hungary taken separately has a legal personality in international law stands above doubt; it simply follows from her being an independent kingdom, "not subject to any other kingdom or nation," as the above-quoted law of 1791 puts it. But since she is bound to Austria by a covenant of mutual defense, and since the law of 1867 has declared common affairs "those foreign affairs which affect the interests of both countries," meaning those which bear direct relation to national defense, Hungary (as well as Austria) has for the time being disabled herself *by her own law* from acting separately in international matters of that kind; she has, with respect to these matters, for the time being, renounced the separate use of her personality in international law, and must, in all cases of such nature, act jointly with Austria.<sup>1</sup> The permanent potentiality of that joint

<sup>1</sup> This is how the matter stands in the terms of the Law XII, 1867. But even should that law be abolished or altered and the whole machinery of common affairs and common ministries be superseded, the obligation to mutual defense founded on the Pragmatic Sanction, which is a bilateral compact, would none the less subsist so long as the present dynasty lasts, and the foreign affairs of both countries would have to be conducted with constant regard to that obligation. How this could be insured under such altered circumstances is a question



action, the union of the two nations for that purpose, is called Austria-Hungary, or, since their ruler is physically one monarch, the Austro-Hungarian monarchy, though that term, as being apt to misinterpretation, is not very felicitously chosen and will probably fall into desuetude. Austria-Hungary, then, as is shown by the double term itself, does not mean one empire, but the permanent union of two nations for certain international purposes. In all international affairs not belonging to the sphere of national defense (such as railway conventions, extradition treaties, copyright conventions, etc.), the international personality of Hungary not only can, but must act separately, because with respect to them there is no union with Austria, and, therefore, their joint action cannot even be juridically constructed, except on the grounds of some (*ad hoc*) convention between them. In fact, some treaties belonging to this category have been concluded jointly by "Austria-Hungary," but this was done by an inadvertence which is not likely to occur again.

It may be difficult practically to draw a precise boundary-line between the matters in which the international personality of Hungary acts separately, and those in which, as long as the present law remains effective, she can act only in connection with Austria; but juridically the distinction exists, and Hungary has availed herself of it in several international treaties which she has independently concluded, and even where joint action is necessary it is not the action of one empire (which, having no substance, is hardly capable of action of any sort), but the joint action of two. Being bound to such joint action in certain matters, the union of these two constitutes one great power; because what is power but potentiality of action — in our case of joint action? But it is not necessary to invest that great power with a juridical personality of its own; the fact that it represents a permanent obligation of two personalities to act jointly in matters of peace and war answers to all requirements, theoretical and practical.

We can easily see now the chief source of the erroneous views generally prevailing about the legal status of Hungary. Our country usually appears in joint international action with Austria, she has a common representation with her; these facts are apt, by themselves, to spread a false impression, which could be prevented only if the forms of such joint action and common representation would clearly indicate, as they ought to do, the two sovereignties which, though acting in conjunction, are possessed each of its own personality.

of practical expediency which we need not discuss here. Some new scheme might be devised, or the guarantee contained in the physical identity of the monarch, whom both constitutions invest with an efficient prerogative in foreign affairs, might be thought sufficient for the purpose. At all events, contrary to a widespread and artificially fostered opinion, the European system of powers would remain undisturbed.

Unhappily this is not the case. In former times the unification of its domains (Hungary included) into one empire has been the constant aim of the dynasty. That aim could never be obtained, owing to the firmness with which our forefathers insisted on their independence; but wherever they failed to keep a close watch, wherever prerogative could escape their control and find an opening, some fragmentary appearance of such a unified empire was called into existence. This could be achieved with the greatest ease in foreign affairs, the administration of which was almost entirely left to the King's discretion, and to some extent in army questions, where much debatable ground existed, and still exists, between prerogative and the rights of parliament. Of these opportunities the dynasty availed itself to the largest extent; while forced to reckon with the idea of Hungarian independence at home, it gave an entirely pan-Austrian character to diplomacy and to all foreign action. That lasted for two centuries at least, and fixed the impressions of foreign opinion in a direction which can be modified only through impressions of an opposite kind working on her for a considerable time. Unhappily, not even now can we point to a complete concord between what falls in the eyes of foreigners and what the relations between Hungary and Austria legally are. A wholesale reform of those misleading forms in foreign (and to some extent military) matters has not yet been effected, though it has begun and will no doubt be completed in a time the length of which depends on the degree of forbearance with which the nation thinks fit to tolerate these last comparatively trifling but obstinate remnants of bad times. Why there should be such remnants at all, which can do no possible good to any one or to any cause, but only serve to irritate and to prevent the growth of perfect confidence and harmony, it is not my business to inquire here, where public law and not politics is my object.

But anxious as I am to keep to that distinction, I must still conclude with an allusion at least to the political side of my question. I should not like to be misunderstood. My strong insistence, my whole country's strong insistence, on her national independence, does not in the least imply a will or a wish to break away from Austria. We mean to keep faith to the reigning dynasty; no nation in its dominions is more absolutely reliable in that respect; we mean loyally to fulfill our compact of mutual defense with Austria; in a word, what our forefathers agreed to as being obligations freely accepted by Hungary, we mean to adhere to, as honest men should. All we want is that equal faith should be kept with us, that those equally binding enactments of the Pragmatic Sanction, which make Hungary secure of her independence as a sovereign nation, as a kingdom, *nulli alio regno vel populo subdatum*, as the law of 1791 puts it, should be fulfilled with equal loyalty.

To such complete national existence we have as good a right as any nation on earth, not on grounds of formal legality only, but because we are conscious of having creditably fulfilled our mission as a bulwark of Western civilization and of liberty. We don't see that this mission is ended, nor do we see how it could be fulfilled, should that organic force of our peculiar national mentality and constitution be missing, should that force which stands unshaken after trials before which stronger empires have fallen into dust, give way to artificial combinations and mechanical contrivances.

We are then only faithful to the supreme law of our destinies when upholding the banner of national independence with unflinching firmness of resolve.

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#### SHORT PAPER

DR. BENJAMIN F. TRUEBLOOD, of Boston, contributed a paper to this Section on "An International Advisory Congress."







SIG. NOR ATTILIO BRUNIALTI,  
*Councilor of State, Rome, Italy.*

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COMMENDATO G. B. ZEGGIO,  
*Italian Diplomat, Florence, Italy.*  
(*Member of the International Jury, St. Louis Exposition, 1904.*)





SECTION B — CONSTITUTIONAL LAW





## SECTION B — CONSTITUTIONAL LAW

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*(Hall 14, September 24, 10 a. m.)*

CHAIRMAN: PROFESSOR HENRY ST. GEORGE TUCKER, George Washington University, Washington.

SPEAKERS: SIGNOR ATTILIO BRUNIALTI, Councilor of State, Rome.

PROFESSOR JOHN W. BURGESS, Columbia University.

PROFESSOR F. LARNAUDE, University of Paris.

IN opening the Section of Constitutional Law the Chairman, Professor Henry St. George Tucker, of George Washington University, spoke as follows: "I deem it one of the greatest honors of my life to be called upon to preside over this Section of this great Congress. As I look into the faces of those gathered here from every country of the world, distinguished for their learning in the greatest of subjects enlisting the interest of the people of the world, I recognize the fact that this Congress, in its full and free discussion of constitutional questions, may be of far-reaching importance to all the world. As an American I may be pardoned for saying that we take a just pride in the development of constitutional law in the Republic of the United States. With the progress of the whole world in this subject before us, we have sought to incorporate into our system the principles developed in each country which commended themselves to our conditions, and have added to them a security of civil liberty to the citizen unequalled in any of the constitutions of the world. We have with us representatives to-day from the kingdoms of Belgium and Italy, who will, I doubt not, instruct as well as delight us in the additions which they will make to our knowledge on this subject."

## CONSTITUTIONAL LAW

BY ATTILIO BRUNIALTI

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In this solemn universal Congress of Science and Arts, the constitutional law must be satisfied with one of the most modest places. Normative and historical sciences, like the physical, mental, and utilitarian sciences, can show marvelous progresses, whilst among all sciences providing for social regulation, constitutional law is one of the less fortunate, because, if its actual problems are among the most important and interesting, — liberty, justice, and welfare of the human race, — the scientific apparatus with which it is preparing itself to resolve them is one of the most insufficient. Of course we can also glory in discoveries and progress filling us with a just ambition and pride — the representative system, the federal state, the bit of presidential government, the values of cabinet government, the participation of the people in the legislation. But if we further our researches we have reason to blush and to feel ashamed of our insufficiency, like the Alboino's physician, thinking how little the science of constitutional law has advanced compared with other sciences. We are even distinguishing the forms of government with the doctrines of Aristotle; we are praising the republic with the words of Cicero; we are preaching socialism with the arguments of Uang Ngan Shi and of Plato. There was a greater originality of political thought in a road of Athens in the time of Pericles or in a palace of Florence in Dante's time than in Rome or in New York in the contemporary period. The reason is that other sciences advanced with precise laws in the increasing surety of their elements, whilst observation and experiment will give to them an ever surer basis, and the science of constitutional law, unable to have recourse to experiment and to find an absolute surety by observation, advanced amidst infinite doubts, admitting the most uncertain and varying solutions for problems implicating the welfare, the progress, and the life of all men in the world.

Not only to be able to advance, but almost to become consolidated and to live, political sciences were obliged to accept essentially conventional laws, which appearing rather as fictions and leading to real conventional lies, like the so-called right of might, and the law of the greater number, as the judicial axioms for which the ignorance of the law is never an excuse, or the judged things are held as absolute truth. The contrast appears even greater because politics is one of the most noble and diffused passions of men, and in the mean time the science of constitutional law leaves us almost indifferent, is not entered in the universal culture, and has the poorest literature. Modern writers are often wanting in a solid, sure method, a method knowing itself, a direction attained from higher principles, a great and very scientific inspiration. And that happened also because the cultivators of other sciences proceed unanimously and compactly, like the Macedonian phalanx, and we are consuming ourselves with isolated efforts, elevating Egyptian monoliths, which few persons are able to appreciate. The reason of that crisis of political science cannot be neglected; it is not possible to fix the manner in which attention should be paid to the solution of modern problems which are imposed on it without knowing the condition of the soul constituting the whole of the feelings and moral tendencies of the present generations. For too long a time are we repeating with Cornewall Lewis,

"The forms of government let fools contest,  
What is best administered is best."<sup>1</sup>

The enthusiasms determined by the revolutions and the modern reactions for the Republic and for the monarchy are avoided; every civilized state rests in the form most convenient for it, and even those that have experimented many forms of government, like France and Spain, seem convinced of the truth declared in the vulgar problem, "*Plus ça change et plus c'est la même chose.*" The best studied constitutional arrangements are not modifying<sup>2</sup> human nature; every form of government has merits and demerits, leaving us little or not at all wanting in radical changes. Consequently, the study of constitutional law is neglected, as we neglect a plant from which we were hoping for wonderful fruits, whilst it grows up not different from the others in the garden of science.<sup>3</sup>

<sup>1</sup> Tremenhoe, H., *A Manual of the Principles of Government as set by the Authorities of Ancient and Modern Times*, London, 1882; Brunialti, A., *Le forme di governo*, Torino, 1886; and see the works of Cornewall Lewis, T. de Parieu, Ippolite Passy, Emile de Laveleye, on forms of government; Hosmer, *People and Politics*.

<sup>2</sup> "On ne s'enthousiasme plus guère ni pour la République, ni pour la Monarchie." E. de Laveleye, *Le gouvernement dans la démocratie*, Preface, p. vii.

<sup>3</sup> Renan, E., *Discours et Conférences*, 2d ed., pp. 99-101; Scherer, E., *La démocratie en France*, pp. 3, 4, Paris, 1884; Deslandres, *La crise de la science politique*, in the *Revue Politique*, 1900, XIII, pp. 10, etc.

Apart from this skepticism, the development of the science of constitutional law was prejudiced by the smaller part left to the human will in the political détermination of the states and the lessons with which the greatest masters of modern thought have imbued minds agitated by doubt. The French Revolution had spread the conviction that the constitution of the state may be essentially the production of individual free will, and the peaceful and marvelous development of the United States has proved with what restrictions that doctrine must be accepted.

Against those bold pretensions of our science, believing to be able to regulate the destinies of society, the standard was everywhere raised; the theocratic school showed the influence of the divine in the constitutions;<sup>1</sup> positivism limited the action of science to the recognition and to the application of natural laws which are governing the destinies of society;<sup>2</sup> determinism and evolutionism, pretending to give the same form of social development, have ruined even more the conscience of liberty, teaching that the best result of constitutional science is to embrace the aggregate, heterogeneous vote of the human race so that it may be seen that every social party and every period of its existence is determined on the one hand by its contenders, on the other hand by past and present actions that other parties are exercising over it.<sup>3</sup>

Even without being skeptic or fatalist, we are obliged to recognize the danger coming to science from this kind of universal conviction, not to be able to find anything better than representative government in its twofold form of presidential or cabinet government, with a more or less direct intervention of people in the legislation. After having little by little or with the violence of the revolutions broken the chains of all tyrannies, advanced humanity found in the representative democracy the delivering political form in which it will be able to develop freely its forces and its activity. Ippolite Passy and Stuart Mill, Thomas Cooley and Bigelow, Webster and Hosmer have kept alive too much this political optimism, so that the cries of alarm of David Syme and of Seaman, showing the vices of the republic, are not able to trouble it as much as those of Charles Benoist, alarmed by the crisis of the modern state and those of our numerous critics of parliamentary government.

Constitutional law is also neglected because the political fever agitating Europe during almost a century has left the place to the economical excitement, so that the dominant preoccupation is not liberty and justice, but welfare and the research of fortune. To reach the supreme degree of production and of consummation,

<sup>1</sup> De Maistre, X., *Essai sur le principe générateur des constitutions*.

<sup>2</sup> A. Comte, Littré, and other positivists.

<sup>3</sup> Spencer, H., *Sociology*, vol. I, p. 590; Taine, H., *L'ancien régime*, Preface, and *passim*.

to approach to the social classes, to fight the privilege of riches, to improve the condition of the miserable are questions which require most our attention and preoccupy it almost entirely. Electoral programs are almost all occupied by economical questions, and to those questions are even adapted the names of the political parties.

Political institutions are mediums to reach the greatest good, and also, as means, they are not kept in great account because they did not succeed in hindering the creation of a frightful urban proletariat, a large inequality of fortunes, an enormous plutocracy, whilst proclaiming the sovereign number they give to the working-classes the need to serve themselves with that sovereign number they are enjoying, to be able to reach their ideals without modifying political institutions, and whilst materialism, positivism, the declining religious feelings are directing ever further their minds towards the material satisfaction of comfort and riches.

Notwithstanding the constitutional law must solve in our days the most important problems of history, the states were never so much exposed to the action of two forces fighting together, of two opposite principles contending one against the other the empire of institutions. If the forces pressing on the state from without and those governing it within would come into conflict one against the other, they would determine a supreme crisis, in which it is permitted to the prophets of misfortune to foretell all the horrors of anarchy and all the reactions of despotism, not without the most audacious transformations on the political map of Europe. The modern state sees ever more in danger the basis on which it seemed ready to defy the centuries, the representative government and parliamentary system, and is directing itself towards the popular government, and meanwhile the external forces operating on it become ever more threatening and show us in a remote light the needed peace of the united states of Europe, through inexorable fatalities of fratricidal struggles of sacrifice, and blood.

You may remark that if the science of constitutional law is important for all, it is necessary to pay attention to the different nature and different problems it is offering in America and in Europe. Well wrote A. V. Dicey: "If I speak of the constitutional law of the United States I know precisely what is the subject of my teaching and what is the proper mode of dealing with it. It is a definite assignable part of the law of the country; it was recorded in a given document to which all the world had access; the articles of this constitution fall, indeed, far short of perfect logical arrangement, and contain, in a clear and intelligible form, the fundamental law of the Union. This law is made and can only be altered or repealed in a way different from the method by which other enactments are



made or altered. Story and Kent, therefore, knew with precision that the nature and limits of the department of law which they intended to comment, must be guided by the same rules as in any other branch of American jurisprudence, and their work, difficult as it might prove, was a work of the kind to which lawyers are accustomed and was to be achieved by the use of ordinary legal methods."<sup>1</sup>

Otherwise it happened with English constitutions and with all others inspiring themselves in it, and which, although the letter is different, were modeling themselves on it in the whole development of parliamentary system. To comment on English constitution, Blackstone may search the statute-book from beginning to end and will find no enactment which purports to contain the articles of the constitution, no test by which to discriminate laws which are constitutional or fundamental from ordinary enactments; the same term of constitutional law is of comparatively modern origin.

Notwithstanding, the English constitution is, in the quaint language of George the Third, "the most perfect of human formations,"<sup>2</sup> which had not been made, but had grown; which was not the fruit of abstract theory, but of the instinct of the people. The celebrated quotations of Burke and Hallam<sup>3</sup> and many others recall with singular fidelity the spirit with which those institutions were regarded.

The Romans spoke of *constitutio principis*, and in some statutes of the Middle Ages the same word is repeated, although it is more frequently spoken of as the *charta* or the *statuto*. Constitutional laws called for the first time in the science are those promulgated in 1643 from Sweden; the word acquires a real importance in the United States, becomes popular in France, and thus becomes the denomination of all fundamental laws of free peoples. The constitution in the Union remains a precise text, completed from the constitutions of the states and of the decisions of a judiciary authority, which is the only one in the world, a real, high, respected political power; the constitutions of England and, in smaller part, that of Hungary, are instead the result more or less definite of a succession of legislative acts or ordinances, of judiciary decisions, of precedents, of traditions. The other states have written constitutions: of popular origin, as America, France, and Switzerland; granted by the sovereigns, as Germany, Austria, and Scandinavia; of a mixed character, as many others and as the Italian constitution, which was formerly accorded by the King Charles Albert, and afterwards became a sacred pact between prince and people, sanctioned with

<sup>1</sup> *Lectures Introductory to the Study of the Law of the Constitution*, London, 1886, pp. 5, 6.

<sup>2</sup> Stanhope, *Life of Pitt*, I, App. p. 10.

<sup>3</sup> Burke, *Works*, III, p. 114; Hallam, *Middle Ages*, 1st ed., II, p. 267.

the popular universal suffrage. It follows the different degree of importance and of precision of the constitutional law among the various peoples, the different way in which to conceive its essence, its nature, the possible reforms, the problems, the extreme difficulties of a scientific synthesis, to which the American constitution is yielding itself as those of Europe are rebelling. Because not only English constitutional law is formed from texts and customs, from laws and conventions, partly written, partly unwritten, but also in the European states that we can truly call constitutional states, besides the written law there is the tradition, having sometimes even abrogative force. So in Italy, according to constitutional laws, the King calls and recalls the Ministers, but according to the convention he is obliged to call as Premier that one who is designated by the parliamentary majority, and who will select the Ministers as your President selects and recalls them; and our Premier is obliged to give notice to the King, as your President to the Senate, although King and Senate are retained authors of the revocation. Thus the King is able to put the veto on a law, but in merit of the action of parliamentary machinery need not do it, and if he should do it, we could say that he has violated the convention of the constitution, although remaining faithful to the constitutional law.

The fundamental problem of our science of constitutional law regards its own existence. Thomas Paine said that a constitution cannot exist until every citizen can have it in his pocket. But just the principal defect of written constitutions is the facility with which so many have been put in their pocket by European princes because they were not initiated into the ideas, into the lives, into the habits of the people. X. de Maistre used to judge a constitution as frail as the number of its written articles,<sup>1</sup> and Mackintosh said that the constitutional laws must not be constructed with a slow result of secular evolutions, but let them increase of themselves. On the other hand, a written constitution is not the simple codification of the customs and of the forms of a government, but is also a guarantee that customs and forms will never be such without the approbation of those who have solemnly confirmed them. Besides written constitutions there exist always customs, habits, traditions, capable of having the greatest importance, and meanwhile it is not possible to say that the shortest and most concise are the best. The United States, for instance, is ever more feeling the necessity of protecting itself against the abuses of legislatures and the intrigues of politicians, and therefore your modern constitutions are all longer than the ancient constitutions and have differences altogether more complex. Beside precepts very statutory, I can read rules limiting

<sup>1</sup> De Maistre, *Essai sur le principe générateur des constitutions écrites*, Œuvres, Lyon, 1884, I, 243.

the tax of interest or the hours of labor, the use of alcoholic drinks, and the provision of note-paper and firewood for the assemblies. The constitution of Missouri of 1865 has 26,000 words, whilst that of New Hampshire of 1776 was all included in 600 words; the following constitutions of Virginia filled 4 pages, afterwards 7 and 18, and the last occupies now 22 pages and has 17,000 words, whilst the first had but 3200 words. Notwithstanding, it seems to me necessary to remark that these constitutional laws have a greater political importance, a juridical character not different from other laws. A state is not able to change its form of government, especially if it is established on a very fundamental pact, as in different ways it happened in the United States as well as in Italy, as it changes the dispositions of electoral laws, and cannot modify this one with the frequency with which it changes the legislation on sugars. But the two elements of constitutional, formal, and substantial law are to be distinguished, but not separated; confusing them, we would have an inexact knowledge of the laws themselves, because leaving aside the material element, constitutional laws are understood as the mediums with which the sovereignty, with free choice, with a complete faculty to change them, becomes self-ruling in order to be able to reach its aims. Constitutional laws distinguished from the others because of their juridical nature, instead of being determined experimentally, are in such a case the effect of a scientific abstraction or an experiment founded on presumptions, and we are knowing the results of this method to understand them. On the other hand, the reactions against this doctrine led to confusing constitutional laws with ordinary laws, giving to the charters an apparent solidity and even a pretension of durability, whilst it was taking from the constitutional law its true, secure, juridical basis.

In the modern state it is necessary, indeed, that the fundamental written constitution have a juridical stability superior to other laws, but meanwhile it may be modified without excessive difficulties, because fundamental principles of the constitution have a greater importance, and may be modified without the larger concurrence of public conscience, with caution and with a consideration which, with other laws, is neither possible nor desirable. But it must be always possible to maintain harmony between the words of the text and the spirit of the institutions.<sup>1</sup> "If a written constitution is not frequently amended," wrote your A. Jameson, "it ceases to answer to the necessity of the political development of a people; and, on the other hand, if it is too easy to introduce new

<sup>1</sup> A. Jameson, *A Treatise on Constitutional Conventions; their History, Powers, and Modes of Proceeding*, 4th ed., Chicago, 1887; Bourgeaud, *Etablissements et Révision des Constitutions Politiques en Amérique et en Europe*, Paris, 1885; Brunialti, *Formazione e Revisione delle Costituzioni Politiche*, Torino, Tip. ed. 1894.

amendments, they are the cause of the continued agitation of political parties. The written constitution less changeable is less elastic, less apt to assure the political progress of a people, especially if its education is elevated and its public spirit developed and energetic.”<sup>1</sup> On the other hand a written constitution is almost a bridge leading to better time, an easier and quicker means of giving civil dignity and political conscience to a people. It increases its juridical sense; it is a watch-tower showing when its liberty is in danger; it offers him a text which can always be recalled and returned after the agitations of revolution and the violence of reaction.<sup>2</sup> I perceive, also, only two moods suitable to reform constitutional law: that embodied in the American Federal Constitution and that one followed in England and in Italy. Among you, consent of the majority sanctions the difficult machinery of the amendments; among us the constitution is surrounded with the highest respect, considered as something not to be touched in its fundamental principles, subjected to the constant action of social and political progress, and is transforming itself in a manner that will enable it to provide for all needs and all exigencies, joining to the most venerated traditions the novelties which are better providing for the wishes, the needs, and the interests of the greatest number, to the very assiduous, fruitful expression of the national conscience.

The English constitution, as we have seen, consists of two different parts; one part is made up of rules, which are enforced by the courts, and which, whether embodied in statutes or not, are laws in the strictest sense of the term and make the true law of the constitution; the other part is made up of understandings, customs, or conventions, which, not being enforced by the courts, are not laws in the true sense of the word. The law of the constitution is the result of two guiding principles: “the sovereignty of parliament and the rule of law.” The first principle means, in effect, the gradual transfer of power from the crown to a body which has come more and more to represent the nation, with two effects: namely, the end of the arbitrary power of the monarch and the preservation of the supreme authority of the state. The second principle, the supremacy throughout all institutions of the ordinary law of the land, determines the substance of English constitution which is, more truly than any other polity in the world, except the constitution of the United States, based on the law of the land. The rule of law is a conception within the United States which indeed has received a development beyond that which it has reached in England, but it is an idea not so much unknown to as deliberately rejected by the constitution-makers of France, Italy, and other Continental countries. The supremacy

<sup>1</sup> Brunialti, *op. cit.* pp. 79, 80.

<sup>2</sup> A. Jameson, *op. cit.* pp. 77, 78.



of the law of the land, the authority of the courts of law can, therefore, hardly coexist with the *séparation des pouvoirs* and with the system of *droit administratif* as it prevails in France and in countries which have followed the French guidances.

Not even Anson, in saying this, asserts that foreign forms of government are necessarily inferior to the English and American constitutions or unsuited for a civilized and free people.<sup>1</sup> But the question of method acquires a singular importance, and the constitutional law in Continental Europe has problems more unknown among you than in England, such that we are obliged to give our attention also to the question of method, as to one of the cardinal points of the science.

Struggle is always strong in the sciences and even in the practice of political institutions, between idealists and sociologists, between the followers of juridical method and those upholding the comparative. The ideal method advances with the rapidity of classic spirit, following every research, with an unlimited confidence, the principles of the mathematic. It extracts, limits, isolates some simple and general notions, it compares and combines them, and from the artificial result thus obtained deduces with reason the consequences it perceives to be contained therein.<sup>2</sup> It is the metaphysical manner of proceeding,<sup>3</sup> or the dogmatic manner, because it derives from principles elevated to dogmas<sup>4</sup> with an unlimited faith in a truth dominating political science, and determines all its solutions. From the *Heaven's Star* of the Persian Vishnu Das and from the *Republica* of Plato, with their numerous imitators, to the *Utopia* of Thomas More, the *New Atlantis* of Bacon, the *Oceana* of Harrington, and the *Cities of the Sun* of Campanella, to the *Looking Backward* of Edward Bellamy, to the *Freiland* of Theodor Hertzka, and to the other social modern romances, we perceive a wealth of literature which has deluded, seduced, deceived, and corrupted humanity.

The mathematical constitution given by J. Locke to South Carolina or that imposed by the Jesuits in Paraguay, and in Europe the aberrations of the social contract of Jean Jacques Rousseau, have shown of what corruption this literature is capable. When we assert with presumption that the constitutions are the work of our reason which is conceiving the fundament and deducing the system, and of our will, which actuated the conceits of reason; when we admit that the human mind enjoys principles, absolute truths, imposed

<sup>1</sup> *Op. cit.* pp. 397, 398.

<sup>2</sup> Taine, II., *Les Origines de la France contemporaine*, vol. I, *L'ancien Régime*, pp. 262, *et seq.*

<sup>3</sup> Liard, *La Science Politique et la Métaphysique*, p. 47.

<sup>4</sup> Deslandres, *op. cit.* vol. xv, p. 395; and more diffusively, Vacherot, E., *La Démocratie*, preface, pp. viii, ix.



by an enlightened internal evidence to our mind, with solutions valuable for all the world we are not able to establish anything firmly. Who will deny that the surest and most durable political creations are just those which were more distant from dogmatism, like your constitution, the result of transitions and compromises between different tendencies, imposed by the necessity of facts, with absolute abstraction from all idealism whatsoever?<sup>1</sup> Nevertheless we do not wish to deny, therefore, the existence of the moral law;<sup>2</sup> we may also admit a certain ideal even in the constitution, until it remains lively and concrete and the ideal may be rooted in the reality, may be as the synthesis of the noblest aspirations of the people, and may correspond to its history, its temperament, and its needs.<sup>3</sup>

The juridical method has had in Italy illustrious precursors who had but a vague idea of it, as G. Romagnosi, but it was specially proclaimed, affirmed, and pushed to its utmost exaggerations in Germany. The state in relation to the law, the *Rechtsstaat*, is a German result tending to exclude politics or to limit them to the totality of *öffentlichenrechtlicher Verhältnissen*, never losing the *rechtliche Natur*, going ever upwards towards *allgemein Rechtsbegriffe*. For this method the constitutional law, the political régime, is a vast juridical system, a totality of relations, rights, obligations, dominated by essentially juridical principles. Promised the analysis *der öffentlichenrechtlichen Verhältnisse*, this method is looking for *die Feststellung der juristischen Natur derselben* and goes afterwards surely *zur Auffindung der allgemeineren Rechtsbegriffe denen sie untergeordnet sind* to return from this ascending generalization, to deduce from the principles regulating the natural consequences *die aus den gefundenen Principien sich erzählenden Folgerungen*. Thus Paul Laband, Georg Meyer, Philips Lorn, A. Gerber, and other German writers are proceeding,<sup>4</sup> guided from pure reason and moreover from logic with a firm faith in the existence of general juridical conceits, believing it impossible to create in any other way, *eines neues Rechtsinstitut, wie die Erfindung einer neuer logischer Kategorie oder die Entstehung einer neuern Naturkraft*.

Such a method is leading to consequences which are possible only in Germany, and by chance in vain are invoked in France and in Italy. Germany has not the science of constitutional law, or rather

<sup>1</sup> Rousseau, J. J., *Contrat Social*; Condorcet, *Esquisse d'un Tableau Historique des Progrès de l'esprit humain*, Œuvres, vi, p. 186; Vacherot, E., *La Démocratie*; Bouald, de, *Théorie du pouvoir politique et religieuse*; Brunialti, *Il Diritto Costituzionale e la Politica nella Scienza e nelle Istituzioni*, vol. i, chap. iii; Kleinwächter, *Die Staatsromane*, Wien, 1891; B. von Mohl, *Geschicht und Literatur der Staatswissenschaften in Monographien dargestellt*, Erlangen, 1855-58.

<sup>2</sup> Secrétan, C., *Les Droits de l'Humanité*; Cournot, *Considérations sur la Morale des Idées*, II, pp. 86, et seq.

<sup>3</sup> Fouillée, A., *L'Idée du Droit*, Paris, 1883; Secrétan, *op. cit.*, in Deslandres, *op. cit.* xv, pp. 425, et seq.

<sup>4</sup> Laband, P., *Die Staatsrecht des deutschen Reichs*, and others.

confuses it with the science of the administration, in which the Emperor and the administration of the Post-Office Department, the *Reichstag* and the *Kreisordnung*, are treated in the same manner, to the absolute expulsion of every political judgment. The method exercises a remarkable witchery in Italy <sup>1</sup> and in France <sup>2</sup> as a reaction of the juridical rigorism against the intervention of parliamentarism in the justice and in the administration and also for the importance and the worth of German works of public right, for the ever magnificent and classic construction of the theories, but it cannot be received. It has succeeded in Germany in order to the federal constitution of the Empire, juridical fundament like all the powers and the organ of the state, and to the juridical means informing all the German science. But the Emperor did not consent to the development of parliamentary government, conserved even a kind of half-absolutism, which we can approve of with a clever and active monarch, but would become dangerous with any other. And before adopting this method it is well to consider how badly founded is the belief in the reign of logic in political institutions leading us towards all the errors of the dogmatic constitutions and how vain the effort to give to politics an exclusively juridical basis, the science of constitutional law is not able to obey in its development the only juridical criterion and would suffice to test it, the deformations to which in fact are subjected the most particular and severe constitutions.<sup>3</sup>

The juridical method would give a false direction to whatever constituent works; meanwhile it leaves political science disarmed in face of the conditions and of the needs of the nation in the encompassing of which severe juridical formalism cannot follow all transformations. Nevertheless, we cannot contradict wholly the tendencies of parliamentary states, to give ever more to their institutions a juridical foundation so that politics may be able to breathe in it, like a vivifying air, but unable, however, to rust the machinery or to beget injustices, violence, or any other kind of abuses.<sup>4</sup> Some others are considering all political sciences as a branch of social science, or with a greater exaggeration, perceiving in the state the most complex and the most delicate organism, is acquiring for itself a place in the natural history, speaking of its evolution, like that of other beings, and asserting audaciously that politics will become a science only with the

<sup>1</sup> Orlando, V. E., *Trattato di Diritto Amministrativo*, Milano, in 10 vols; Majorana, A., *Lo Stato Giuridico; Stato Costruzione*.

<sup>2</sup> Hauriou, *Principes de Droit Administratif et de Droit Politique*, Paris, 1903, pp. 137, et seq.; *La Conception Juridique de l'Etat*.

<sup>3</sup> Also for the American Federal Constitution see J. Bryce, *American Commonwealth*, vol. I, p. 101: "So hard is it to keep even a written and rigid constitution from bending and working under the actual forces of politics."

<sup>4</sup> Gumpłowicz, *Sociology*; Bendant, R., *Sur l'Application des Méthodes Sociologiques à l'Etude des Sciences Sociales*, in the *Revue de Droit Public*, 1896, vol. v, pp. 334-456; Deslandres, *op. cit.* XIII, p. 297.

aid of sociology.<sup>1</sup> It is true that even sociologists are agreed in determining the characters of the method they are applying to social facts; they are only asserting that social phenomena are identical with the natural or even less bound to their form. An inflexible relation of causality, gathered from a severe determinism, in relation to which science respecting it is essentially positive, and determines with observation and investigation the laws of phenomena. "Science studied," said Spencer, "the increasing, the development, the structure, and the functions of the social aggregate, for the reason that it is a result of the mutual action of the men."<sup>2</sup> Some writers are making a natural history of human societies, determining and classifying genders and kinds, describing the anatomy of their organs, analyzing the physiology of their functions, tracing the curves of their evolution.<sup>3</sup> Others again are studying social facts and looking for the laws which are mechanically governing them, with a greater objectivity, following more scrupulously the traces of this experimental method, going back to Aristotle, perfected by Galileo, and which led to the most important discoveries of modern science.<sup>4</sup> Metaphysical sociologists like A. Comte, anthropologists like Letourneau, psychologists like Espinas, historians like Spencer, have already demonstrated what is the worth of the method, until it is limiting itself to observation. Not one of them is offering us a sure conclusion; they are agreeing neither on the substratum of science, nor on its end, nor on the essence of social facts, nor on any political application. Conservation or progress, liberty or authority, individualism or socialism,—such a method has for every one a solution, but there is no sure and positive conclusion. Until it is handling of past and of present, the collection of facts is important, observation complete, but when we are looking for the secret of the future, when we will remove the criterions of the constitutional law and of its development we perceive the absolute impotency of it, which is giving us middle types existing everywhere, providing solutions which are not finding applications.

To correct this impotency of the sociological method, the comparative method is lending its aid. After the detailed observation of social facts, their comparison is necessary, which Montesquieu was already opposing to the dogmatism of Rousseau, investigating

<sup>1</sup> Balecki, *Staatsobligatorische organisation der Politischen Gesellschaft*; Letourneau, *L'Evolution positive dans les races humaines*; Espinas, *Les sociétés animales*; Spencer, H., *Social Science and Sociology*; De Roberty, *La sociologie*; Fouillée, *La science sociale contemporaine*.

<sup>2</sup> *Social Science*, pp. 5, et seq.

<sup>3</sup> Espinas, *Les sociétés animales*; Schäffle, *Bau und Leben des Socialen Körpers*; De Lilienfeld, *La société humaine considérée comme un organisme vivant*; E. Perrier, *Les colonies animales*; Bourdier, *Vie des sociétés*.

<sup>4</sup> Fouillée, Balecki, *op. cit.*; De Greef, *Les lois sociologiques*; Duguet, *Le droit constitutionnel et la sociologie*.

the *esprit des lois*, and proposing the imitation of England, as later did A. de Tocqueville and Edouard Laboulaye that of the United States of America.<sup>1</sup> But in that manner we are falling again into idealism; meanwhile the real comparative doctrine inaugurated from Le Play observes all special facts to be able to ask, with serene impartiality, fruitful examples from the various free peoples, as Aristotle gathered and studied the seventy constitutions of the Grecian world to reform that of Athens.<sup>2</sup> So some modern writers are succeeding in a kind of common constitutional law, of relative ideal, which make them penetrate into the edifice of national right, the data admitted on the territory of comparative law, almost a quintessence of the various institutions.<sup>3</sup> A general political science, obliged to study all political forms for determining and classifying all the various types in which may be combined the institutions governing the states; to examine the correspondence between these institutions and the conditions of the ambient, the races, the periods in which the different peoples can meet to examine the worth of the different organism, the measure in which they are satisfying the needs of society, and to study the general laws of their development. A so conceived general political science requires, of course, the comparative study of the greatest number of political arrangements. We cannot deny that the method is on its part alone insufficient and unable to give us complete solution. The imitation inspired from the best comparisons can resolve itself into a pure dogmatism, and we must not forget what Montesquieu himself wrote, that political laws must be so much adapted to the people for whom they are made that it is a very strange case if those of one nation can be convenient for another.

It is useless to stop at other scientific methods that some might find in the application of common good sense and others might find in the application of the laws of history. What we have said is sufficient to show that to be able to resolve the present scientific problems of constitutional law, in their variety, and in their importance, we are obliged to move by observation and with the guidance of history and will gather the greatest number of facts. It is necessary to study these facts in themselves, in the cause determining them, in their consequences, aiding ourselves in this second study with scientific research. On this investigation must follow the experiment, guided by common good sense, with almost no dogmatic

<sup>1</sup> De Tocqueville, *De la Démocratie en Amérique*, 3 vols.; E. Laboulaye, *Paris en Amérique, Questions constitutionnelles; Conférences sur les Etats Unis d'Amérique*.

<sup>2</sup> Le Play, *La réforme sociale*.

<sup>3</sup> See the Reports of the International Congress of Comparative Legislation in 1900, and generally the reports made by Lambert, Larnaude, Soleilles, and others; *Conception et objet de la science du droit comparée*, in *Bulletin de la Société de Législation comparée*, 1900, pp. 389-405.



spirit, without pride and obstination, in a manner to be able to conserve and to perfect the convenient political institutions, to abandon and reform the others.

Therefore political science considers as particularly adapted for its purpose the federal states, which is a very laboratory of political experiment. Thus and not otherwise perfect and spread itself the homestead, the holidays, the legislative referendum, the municipalization of some public services, whilst other reforms, which seemed destined for a great future did not succeed to prevail in a like measure. I will only recall the woman suffrage, the proportion of representation. A state of the union, a canton of Switzerland, adopts the reform, another one studies and perfects it, and experiments are following various parallels contemporaneously; they may study and compare with the aid of investigation and results correct themselves or advise the abandonment of an idea which appeared surrounded with all possible seductions. Old England in merit of its internal composition and of its numerous colonies became, like the federal states, a political laboratory, but now, even the nations most devoted to uniformity are putting themselves in this way. In Italy we have at last understood that unity can exist only in variety, that the agrarian laws of Lombardy cannot be suitable for the Roman Campagna; the industrial provisions sufficient in Turin are not so in Naples; the laws for the fishing of sardines on the Adriatic cannot serve for the fishing of tunny or of sponges; and overcoming an instinctive repulsion, we made many special laws for the Roman Campagna, for the basilicata, for the acid-fruits of Sicily, for the industries of Naples, and for building water aqueducts for Apulia.

So the modern problems imposing themselves on the constitutional law are keeping us farther from dogmatic abstractions, from classical types, from prejudices, and from unilateral conclusions, whilst the common fund of the science is ever increasing. It would be sufficient to show, therefore, the modern transformation of the public law of England. Whilst the European Continent was admiring self-government, the constant active participation of the leading classes in the general and local government, and all those singularities, agreeing in a secular, historical evolution, more than in the theoretical conceptions of the studios, England was reforming its arrangements, shaking the most ancient basis of the constitution and of the administration, destroying their aristocratic character, yielding to the prevailing democracy, and approaching to the institutions of the Continent by new concentrations of power, by the simplification of old institutes, by the continued substitution of paid functionaries to the honoraries, by the increasing of public expenses. It is true that as R. Gneist observed, "the transformation happened easier in England because the state had obtained during the centu-



ries, a complete supremacy in matters of war, justice, police, finance, and its relations with the Church.”<sup>1</sup> The House of Lords is transforming itself, and the House of Commons has become the expression of the conscience of the nation, as in a most complete democracy; the control of finance is perfected, the action of parliament is ever farther extending itself to the Church, to the school, to economical reforms, increasing the state’s protection in the interest of the weak; giving to all social legislation a development which overcomes the most audacious aspirations of the *leges agrariae*, and anticipates sometimes the same requests of socialism, never neglecting to appeal to all individual energies. The conferring of offices as well as all that which concerns the civil service is transformed, keeping in account the examples of the Continent; the self-government followed the increasing interventions in sanitary police, in the beneficence, in the administration itself with numerous boards, disposing of enormous powers. The ancient squire finds himself at the mercy of the rural majority, and the allotments, the surveyance, and the inspections of the unhealthy dwellings, the direction of charities, the roads, are offering ground for new struggles, raising new problems, determining consequences hardly foreseen in the distribution of feudatory ownerships, in the power of the ancient leading classes, and in all social arrangements.

Therefore, who will understand the English constitution with Montesquieu, or also with Macaulay and Hallam, and even with Bagehot, would prove the same deceits, like your students if they would continue to follow the lessons which Francis Lieber dictated in the year 1853 *on civil liberty and self-government* for South Carolina and perfected in 1859 from the chair of Columbia College. When we think of the modifications to which even this ideal of liberty was subjected, we are obliged to recognize that you have acted wisely without giving any definition of liberty in the federal constitution and causing it to enlighten the world like a supreme watch-tower in the port of New York. Of course no one will deny that what is beautiful, great, and useful in the world is due to liberty; it is the reign of the right, but there is no right without liberty. It is the conquest of centuries, during which the weak was subjected to the strong, the debtor to the creditor, the laborer of the land to his feudal lord, the infidel to the torture of the Inquisition, a whole human herd to a few audacious and lawless men. Liberty has changed the slave treated like things, the prisoner sacred to the inhuman hecatombs, the vast populations voted to the sacred springs, the slaves bent on the feudal soil, the subjects watched by a suspicious police into citizen legislators of modern democracies.

<sup>1</sup> *Englische Verwaltungsrecht der Gegenwart*, Berlin, 1882, 1st ed.; *Englische Communalursprung*, Berlin, 1883, 1st ed.; *Geschichte der Englische Parliament*, Berlin, 1890.

I beg you yet to consider how that conception of liberty, appearing so simple and undoubted to our fathers, was modified in face of the new necessity of the modern state, and with its modifications exercises the most decisive influence on the development of constitutional law. Many of your constitutions, like those of Alabama, perhaps the most explicit, are still openly declaring that the sole object and only legitimate end of government is to protect citizens in the enjoyment of life, liberty, and property, and adds that when the government assumes other functions it is usurpation and oppression. In analogy to such principles all your political machinery asks essentially from the government to assure the general well-being and considers as an enemy whoever is contrasting in this way the opinion of the majority, although that majority has in our days, as in the time of A. de Tocqueville, its tyrannies.<sup>1</sup> But meanwhile in America, also, this classic conception of the state is modifying itself, and new constitutional laws, always more detailed and complicated, are joined to those already existing.

You know it, but to a European it helps remembering it synthetically. Here no one thinks of restraining the political suffrage that we can now call universal, and it would be an enterprise more difficult than to change the course of the Mississippi, but under the old forms of the restrained and partisan *caucus* rouses the conceit of public preparatory elections; in almost all states the registration of the electors becomes obligatory, and the lists are every year examined with an ever serious guaranty, the electoral chairs are presided over by citizens named by the judges and assisted by the representatives of the candidates; the ballot is always more guaranteed. Thus becomes prevalent the system of assigning different days for the different elections, whilst the number of elective offices is notably restricted. Developing the fruitful germs embodied in your first constitutions, you are increasing ever more the prohibition to make laws on determinate subjects, to preserve untouched the uniform action of the regulating laws of persons and properties condition, preventing the guaranties in the manner of proceeding from being altered, whilst the same constitutions are limiting or regulating the assessment of the tax and the faculty to contract debts.

To the annual sections are substituted the biennial sections, renouncing to that which seemed to the colonies such a supreme guaranty to induce them to rebel against the third Stuart; the duration of these sections is always brief, so that only the necessary laws be passed; even the ancient Roman wisdom considered too many laws as a corruption of republic: *Corruptissima república plurimæ leges*. Finally, the bills *in extremis* and the political riders

<sup>1</sup> *Démocratie en Amérique*, part II, chap. vii, sec. 3.

are not allowed, as England had forbidden the taking bills. On the other hand, the people are called upon to take a more active part in the work of the legislature, with the referendum, of which we have always more numerous applications even in Europe, and with local option.

More remarkable than all is the progressive increasing of the powers of the executive, that is the government. That which in the time of Jackson seemed a constitutional usurpation, is now considered as a necessity. And in the states as in the smaller local organisms, the executive, much more than in the federal government, was able to develop and reinforce in the houses its two functions of coöperation and of antagonism. The exercise of the veto is an ever serious and efficacious bridle and a far greater influence is deriving to the executive from the right of appointing to the public offices, which, in spite of many and lively oppositions, is always more subjected to guaranties and to controls of undoubted efficacy. A more strict chain of proceedings is accenting itself ever more strongly, even in the federal government, between the executive and the legislative power. Burgess<sup>1</sup> prophesied that these United States will be induced to temper the presidential government with some rules of the cabinet government, as this one has already the greatest independence from the parliament. In conclusion, if Williams could write<sup>2</sup> that an American citizen can pass his whole life without invoking the federal laws, and putting into action the Union's powers, to-day it is more exact to repeat with Wilson<sup>3</sup> that the federal government is knocking at the door of every citizen with the same authority of the state's government.

Some find such a development of the authority of the American government not existing without serious dangers. But you smile at the new prophets of misfortune as at the old ones when, pre-occupied with any anarchical phenomena, they elevated to the gospel the letter in which T. Babington Macaulay described with dark colors your future, like those who, seeing elected and reëlected to the presidency a general haloed with the glory of recent victories, had already seen the democracy almost wrapped around as Laocoön in the mortal coils of imperialism. To-day, for example, some one preaches in the action of the trusts the sure victory of socialism.

It is true that Charles Marx foretold a seeming capitalist concentration as a sure preparation for the actuation of his doctrines. But the trusts are reducing apparently the production to unity; in reality they are multiplying it indefinitely with all the power of the machinery of the joint-stock companies, because to three, ten, twenty

<sup>1</sup> Vol. II, pp. 38, *et seq.*

<sup>2</sup> Cited in Boutmy, chap. 2, p. 166.

<sup>3</sup> *Congressional Government*, p. 25.

producers, they substitute five, twenty, a hundred thousand stockholders, and where we may seem to perceive the struggle, there is interested a great quantity of citizens, especially the humble and incapacitated, women, minors, shopkeepers, even beneficent institutions, even universities and great scientific societies, a larger system of participation in benefices, than we might even have imagined. To think a concentration of all capitalist forces, which may necessarily correspond a general league for the most violent struggle of classes to the bloody social revolution, is an exaggeration. Here, more than elsewhere, helps a proverb of the ancient Greeks who were comparing the liberty governed by the law to the lance of Achilles, which had the twofold virtue of wounding and of healing. In fact President Roosevelt gives to his state the *New York Business Company Act of 1900*; afterwards creates the federal ministry of commerce and finds in Philander Knox his Merlin. Putting aside the trial of an always extremely difficult reform of the federal constitution, the battle will continue in the courts of justice which, armed with the *anti-trust law* of Sherman, are striking inexorably; and therefore, beginning from the *Beef Trust* and the *Railroad Trust*, provoked the summary justice of the Stock Exchange. Such frightful institutions, appearing at the beginning of social revolution, are falling down like paper castles built by children. Nicolo Macchiavelli, who left us precious political instructions, says: "That the things beyond their natural foundation are not lying, neither resist."

The American plutocracy will not be mightier than Cæsar and Charlemagne, than Gregory VII or Napoleon, if it will pretend to check the laws of nature or to change the course of history. What did not succeed among despots who could glory that they were descended from Jupiter, who could dispose of an unlimited power and proclaim themselves to be the state in face of an ignorant and subjected mob, without energy and even political conscience, cannot succeed in a free land to an only potency, even the greatest, as it did not succeed with John Locke to transfer to South Carolina the English feudalism, or to the Jesuits of Paraguay the celebrated constitution regulating even the hours of conjugal debt, as criminal sociology will never succeed to suppress the born delinquents, or electoral legislations to prevent the bribery.

The solutions are perhaps easier in Europe, where there is accorded to the state a more complete action, in merit of which it appears more organic and stronger and is able to strike severely, as yesterday in Germany, socialism; to-day the religious congregations in France; to-morrow, perhaps, in England or elsewhere, the trusts or other social manifestations. And yet there continues among us, especially on the Continent, the doctrine of patriarchal government of society; therefore the greatest interests, of which here voluntary associations,



incorporated and authorized by the law, are taking care, are among those directed by governmental authority. Such an intervention appears more necessary because it is wanting among us and it would not be possible to organize in the same manner as a real political power the judiciary authority, so as to be able to have this sure protection it is offering to your institutions, and, on the other hand, this individual energy became weakened governing the whole American political life, infusing into it force, making it admirable throughout the most terrible crisis.

The increasing necessity of protecting the most feeble in face of industrial organizations, of the power of capital, of the same struggle for welfare is determining the new developments of the action of the state and of municipal corporations. Therefore we are disputing in Italy if we must confide to the government even the control of the railroads, although the experiences of some European states and the peculiar difficulties of administration and control granted to the exigencies of parliamentary system should not let us advance in this direction. So we have recent laws which allow the municipality to exercise the monopoly of the most different enterprises, light and water, trolleys and telephones, hygiene and moving force, bread and meat, ice and funeral pomps.

There follows a number of new problems, imposing themselves on the governing constitutional law: organizations of the referendum, administrative and financial controls of the new managements, bits to the new rules on political and municipal elections. There arises the twofold necessity of a more detailed development of the legislation, so that to the administrative arbiter, who has a great action in the silence of the law, may happen a precise disposition, able to be a rule for authority, a defense for the citizens, and of a judiciary authority unknown to the Anglo-Saxon law, almost new to our institution, the administrative justice with which the state that cannot and will not be subjected to the ordinary judges in administrative matters concerning not the right, but the interest, became judge and party, yet granting to the citizens, with these administrative tribunals, such guaranties not to be neglected.

Gentlemen: History and reason are teaching us that the science of constitutional law must not preoccupy itself more than once with possible reactions or revolutions. We are convinced that our forms of government, although not approaching the ideal in a general interest, to give to every citizen force proportionate to his effective worth, whatever may be his social condition. The struggle of the classes is nonsense where the majority rules, where it depends on this majority, made up of working-men, to modify the laws, which in some states favor concentration, protect usury, and are exposing the working-classes to the unlimited struggles of competition. The law



is the expression of the public conscience, the formula of that which the nation recognizes as necessary and useful, and to which it submits itself freely. We must not ask from politics what it cannot give. Persuaded that the ideal state does not exist, perceiving that in this modern age liberty is greater, justice surer, morals higher, the general well-being more widely spread, that the defects of our political institutions seem to us greater because we can censure them freely, we are obliged to look for the future, from what we are now in comparison to past times, from the progress reached in so many centuries and amid so many difficulties. So well as from the ancient city, across the aberrations of the great Asiatic and Roman monarchies, the invasions of the barbarians, the brilliant feudal anarchy, the struggle for the supremacy of the Empire and of the Church, the patrimonial state and the police state, we have arrived at the national state, the progress of constitutional law will lead us to the universal state, which before being the aspiration of modern society has been the promise of the Gospel, the tentative of the Empire, the belief of the Church, and it remains ever the regret of the intellect which struggles with the reforms of the law, the most beautiful dream of the men of heart, longing for the infinite progress of humanity.

# THE PRESENT PROBLEMS OF CONSTITUTIONAL LAW

BY JOHN WILLIAM BURGESS

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TEN years ago one was accustomed to hear the proposition confidently advanced and stoutly maintained that the period of development of constitutional law had closed, and that the civilized world was in the period of administrative development. I knew then that this proposition, if not an error, was at least an exaggeration, and everybody knows it now. If the devotees of administrative law and theory had been content to say that constitutional law had reached a much fuller development than administrative law, and that its unsolved problems, though highly important, were fewer in number than those of administrative law, no fault could have been found, or could now be found, with the contention. But the events of the last six years especially have shown most conclusively that the work of the constitution-makers is far from completion, and that we have entered, or are about to enter, upon a new period of constitutional development. Facing this situation, let us, in the short hour allowed to this paper, discuss a few of the more important problems which await solution or a new solution.

All questions of constitutional law, as of political science, may be classified under three grand divisions, viz., sovereignty, government, and liberty.

I will not enter upon a philosophical treatment of the term and concept "sovereignty." I will only say that in every constitution there should be a workable provision for its own amendment, and that in every perfect, or anything like perfect constitution, this provision should constitute organs for accomplishing this purpose which shall be separate and distinct from, and supreme over, the organs of the government, which shall truly represent the reason and the will of the political society and the political power upon which the constitution rests, and which shall operate according to methods and majorities which will always register the well-considered purpose of that society and that power. I hold the first problem of

the constitutional law of the present to be the fashioning of the clause of amendment so as to correspond with these principles.

If we examine the constitutions of the great states of the world, and contemplate their history during the last twenty-five years, we shall see at once how pressing this necessity is.

Leaving out of account the British constitution as being, in the ordinary conception, an unwritten instrument, and the Austro-Hungarian *Ausgleich* as partaking more of the character of a treaty than of a constitution, we shall find that the constitutions of three of these states, viz., Spain, Italy, and Hungary, contain no provisions at all for their own amendment; that all the rest, including Great Britain and excepting France and Switzerland, use exclusively the organs of their governments for making constitutional changes; that France uses the *personnel* of her legislature, but under different organization, for this purpose; that Switzerland accords her legislature a power of initiating such changes, which in practice frequently creates embarrassments to the prompt and certain action of the popular will; and finally that all except Great Britain, France, Switzerland, and perhaps Norway, require such majorities for action as to make these provisions generally practically unworkable, except in times of great excitement, the very moments, if any, when they should not work.

Let us take, for example, the provision of amendment in the constitution of the United States as being the one in which the majority of this audience is probably most interested, and as being the provision made by that great state which more than any other professes to develop through the methods of gradual and peaceable reform rather than through the European and South American methods of revolution and reaction. This constitution was framed originally, without any warrant of existing law, by a general convention of delegates selected by the legislatures of the different states of the Confederation, except the legislature of Rhode Island, and it was adopted originally, also without warrant of any existing law, by conventions of delegates chosen by the people within these several states. The general convention proposed, or more correctly ordered, and that, too, without any warrant of existing law, that the proposed constitution should go into operation when ratified by conventions of the people in nine of the thirteen states of the Confederation, and it actually went into operation when conventions of the people in only eleven of these states had ratified it.

I shall not enter upon any criticism or any scientific explanation of these procedures. I will only say that to my mind they were entirely extra-legal, and, therefore, revolutionary, but were necessary, necessary because of the absence of any workable method of amendment in the Articles of Confederation.

Warned by this experience, the framers of the new constitution wrote a method of amendment into this instrument which they expected could be and would be effectively exercised.

It *was* exercised, first, to limit the powers of the central government in behalf of the individual, to perfect the realm of individual immunity against the powers of the central government, which was in the line of true progress. It was applied, in the second place, in behalf of the exemption of the states from the jurisdiction of the United States courts, which was the first result in constitutional law of the reaction of 1793 against the national movement of 1787. And it was employed in the third place to cure some of the defects in the election of the president and vice-president. Then for more than sixty years, while the mightiest changes were being realized in the social, political, industrial, commercial, and educational conditions of the country, not one trace of any of them found its way into the constitutional law of the nation.

We may say that the main direction of the movement in the social, political, and economic elements down beneath the constitution was, whether consciously recognized or not, towards limiting the powers of the states of the Union in behalf of the powers of the central government and the liberty of the individual. The pressure of the movement was so strongly felt by so great a portion of the people of the country, and so strongly resisted by another great portion, that it led to the appeal to arms of 1861. The method of amendment, intended for every exigency, had proved itself unequal to the emergency, and when employed again in the last three constitutional changes, it simply registered the results of battle. In the main, what was then and thus accomplished was correct in substance, but the method which was necessitated showed again that nothing like the perfect principle and form of constitutional amendment had been reached.

And now, again, for thirty-five years mighty changes have been wrought in the structure of our political and civil society, and in our commercial and industrial relations, and yet not one of them has been registered, by the process of amendment, in our constitutional law.

From this brief review it seems entirely manifest that the method of amendment provided in the constitution of the United States is ordinarily unworkable, and that the first problem of the constitutional law of the present in this country, as well as in almost all other countries, is the revision of the provision for constitutional amendment. Let us now scrutinize a little more closely the details of the provision in order to make its defects clear and definite. At the very first glance we discover that really four methods of amendment are legalized by the provision. The first method authorizes

the initiation of an amendment by a constitutional convention of the United States, called by Congress on demand of the legislatures of two thirds of the states of the Union, and ratification by conventions of the people in three fourths of the states. The second method authorizes the initiation of an amendment in the same manner and by the same body as the first, and ratification by the legislatures of three fourths of the states. The third method authorizes initiation of the amendment by a two-thirds vote in both houses of Congress and ratification by conventions of the people in three fourths of the states. And the fourth method authorizes initiation of the amendment in the same manner and by the same body as the third, and ratification by the legislatures of three fourths of the states. Only one of these methods, however, has been employed, viz., the last. Convenience has dictated this, and convenience is ordinarily stronger than principle in a country which moves so fast as ours does.

Now it is evident that what makes these methods of amendment almost practically unworkable is the extraordinary majorities required both in the initiating and in the ratifying bodies. The idea was, of course, to make constitutional change conservative, a laudable purpose indeed, but a dangerous thing when that conservatism is mechanical and artificial, and it always becomes such when it permanently prevents the will of the undoubted permanent majority of the whole people in a democratic republic from realizing its well-considered and well-determined purposes in its organic law. There is a natural way to secure and preserve true conservatism, a way which does not contradict the fundamental principle of majority right, and that way should always be followed.

This matter of the majority is not, however, the sole element in the problem of a proper provision for constitutional amendment. There are several other points of great importance. One I have already adverted to, viz., the error in sound political science of using the *governmental* organs for the making of constitutional law. To illustrate this let us consider the process of constitutional amendment in the German imperial constitution. According to the provision of amendment in that instrument, constitutional law can be made by a simple majority vote in the Reichstag sustained by forty-five of the fifty-eight voices in the Bundesrath, while the two bodies by simple majority vote in each make ordinary law. Now it is the impulse of the Reichstag to call every measure which it desires to see passed ordinary law, and it is the impulse of the minority in the Bundesrath to call every measure which it desires to defeat constitutional law, and the constitution provides no organ for determining a hermeneutical contest over this point, unless the Emperor's power of promulgating the laws covers the question. Some of the



commentators upon that instrument contend that it does. Some say that in the exercise of his power of promulgating the laws, the Emperor may look into the content of any measure, and that, if in his opinion the measure is one of constitutional law and has not received the proper majority in the Bundesrath for making constitutional change, he may refuse promulgation. But the Reichstag does not accept this doctrine. Moreover, it is the practice in the Imperial legislature to allow the passage of a law by that body which is not authorized by any power at the time vested in that body by the constitution, provided it has received the necessary majority in the Bundesrath to make a constitutional change. Such a law is not inserted in the text of the constitution as an amendment to that instrument, but it is incorporated in the ordinary statutes, and the question arises at once as to how it may be repealed, whether by the method for making or repealing ordinary law or by that necessary for making constitutional changes.

Under such a practice, the whole question as to what is constitutional law and what is ordinary law becomes confused. From the point of view of written constitutions, constitutional law is the law provided in the constitution. From the point of view of unwritten constitutions, on the other hand, constitutional law is that part of the law which *ought* to be regarded as fundamental and organic. There is sufficient opportunity for difference of opinion in regard to the first kind of constitutional law, but in regard to the second there is no complete agreement on the part of any two minds. Of course, the two kinds of constitutional law ought to agree exactly. What, from a true philosophical point of view, is fundamental and organic ought to be in the constitution, and, *vice versa*, what is in the constitution *ought* to be fundamental and organic, nothing more and nothing less. But in practice there is a wide difference as to result between the *interpretation* of a written instrument and individual opinion, or popular opinion, or legislative opinion, or executive opinion, as to what part of the law *ought* to be regarded as fundamental and organic and what as ordinary. In the first there is some measure of certainty and continuity; in the second, on the other hand, there is very little. And when the two processes of determination are authorized in the same political system, they are bound to introduce inextricable confusion. The root of the difficulty is to be found in making the *governmental* organs the organs for constitutional amendment. The *personnel* of the government, especially of the legislature, may be used for making constitutional law. It would be inconvenient, and perhaps injurious, if it could not be. But it is not necessary that this should be effected through the *governmental organizations*. That *personnel* may be specially organized for this purpose, as the French constitution provides, by uniting all

the members of both legislative chambers in one national constitutional convention with constituent power. The *body* authorized to make constitutional law and constitutional law only being entirely distinct from the *body* authorized to make ordinary law and ordinary law only, even though composed of the same individual persons, there can be no possibility of confounding the two kinds of law in any system.

Finally, there is a grave problem of constitutional law involved in the exception, to be found in some of the constitutions, of certain subjects from the general power of amendment. This occurs usually in the constitutions of those states which have the federal form of government, as in the constitutions of the United States and of the German Empire, where the existing relations of representation of the States of these Unions in the upper chamber of the legislature is excepted from the ordinary course of amendment and made subject to a still more impossible process, and strangely, and in an even more exaggerated form, this defect is to be found in the French constitution, where two subjects are excepted from *any* method of amendment whatsoever, viz., the form of the government and the disqualification of the descendants of former reigning houses for the presidency of the republic. These exceptions to the power of the legal sovereign in amendment are rotten spots in any constitution, and if not rooted out will spread and spread until their moldering influence will be felt throughout the entire system.

The practical and all-important question, however, is as to the way in which they can be eradicated, regularly and lawfully, and without recourse to revolutionary means. Take for example again the constitution of the United States, which declares, in the article of amendment, that "no state, without its consent, shall be deprived of its equal suffrage in the Senate." This means, of course, that if the attempt should be made to reduce the representation of any state in the Senate in relation to that of the other states, by the process of constitutional amendment, — and that is the only way, of course, in which it can be lawfully done, — this can be effected only with the consent of the legislature of, or of the convention in, the state whose relative representation it is proposed to reduce, together with the consent of one or the other of these bodies in enough of the other states to make out a three-quarters majority of the whole number; and that if the attempt should be made to increase the relative representation of any state, this can be effected only with the consent of every other state of the Union, given through its legislature or convention.

There is thus, theoretically, a way provided for expunging from the constitution this exception to the ordinary operation of the legal sovereign, the amending power, but practically it is utterly

unworkable. If we are ever to rid ourselves of this obstacle we must find some other way than that which I have just outlined as the apparently legal way. But is there any other legal way? Can the amending clause itself be revised by the ordinary course of amendment so as to omit the exception in behalf of the equal representation of the states in the Senate? It certainly can be so revised as to anything and everything else. But I am quite persuaded that the framers of the constitution never intended to provide *any* means whereby this exception could be set aside. I am quite sure that they intentionally placed this obstacle in the way of the legal sovereign, as they organized it for ordinary action. I do not feel sure that they realized the fact that they were sowing the seeds of revolution upon this subject by erecting an insurmountable barrier to regular constitutional progress concerning it. The great natural, universal, and irresistible principle of development was not then understood as now. Men really believed, at that stage in the growth of philosophic thought, that they could construct institutions for all time, which would need no change or improvement.

There is, indeed, good ground in *political philosophy* for holding that the amending clause in a constitution may itself be revised by the general process provided therein. These grounds are that there cannot be *logically* two legal sovereigns within a constitution any more than there can be two original sovereigns behind the constitution, and that there cannot be *logically* any exceptions from the power of the legal sovereign any more than there can be from the power of the original sovereign. Different methods of *governmental* action in regard to the same subject, and exceptions from the powers of the *government*, are all scientifically legitimate, but the exercise of *sovereignty* is an entirely different matter. One body and only one can possess it at any given time within a given state, and from its operation nothing whatsoever can be logically excepted. But when we shift from the legal to the political in respect to this subject, are we not committing a revolutionary act? I think this must be acknowledged. It must be conceded that we are committing the same kind of a revolutionary act as that committed by the national constitutional convention of 1787 and the ratifying conventions within the states of the Confederation. If *that* was justifiable, *this* would be, and upon exactly the same grounds, viz., that existing legality upon this subject does not comport with the social, political, and economic conditions of a national democratic state, but contradicts them in an unendurable way and to an unendurable extent. Sound political theory demands that the amending power *within* the constitution, the *legal* sovereign, should be an organization faithfully representing the *original* sovereign *behind* the constitution, separate from, independent of, and supreme over, the powers of

the government and the liberty of the individual, subject to no limitations or exceptions sufficiently facile in its action to meet all important exigencies, and when using the *governmental* organs at all in the making of constitutional law, using them in a *ministerial* but not in a *discretionary* capacity. And sound constitutional law demands the same things. Without them the system of constitutional government and constitutional liberty will not be able to stand in permanence. The invincible principle of development will force changes upon any and every constitutional system, as upon everything else in the universe, and if these changes cannot be made by *amendment*, by the *legal sovereign*, they will inevitably be made by the *government* or some part of the government, in Europe by the legislature as a rule, and in the United States by judicial approval of legislative or executive acts. But, by whichever of these two methods, it comes to the same thing, viz., gradual governmental usurpation against the limitations of the constitution, the ultimate destruction of the constitutional system.

These are the considerations which lead me to hold that the first great problem, logically, of the constitutional law of the present is the construction of a proper provision for amendment which shall have the qualities which I have just outlined. Not a single great state in the world had such a provision in its constitution, and not a single one has anything approaching it, except, as I have said, France and Switzerland. Of these two, Switzerland has come nearest to it in the provision which allows an amendment to be proposed by fifty thousand Swiss voters and to be ratified and adopted by a majority of the Swiss voters, provided this national majority includes a majority of the voters in a majority of the cantons, and using the governmental organs at one or two points only and then only in a ministerial way. The great defect here is that throughout the whole process there is no place nor opportunity for any sufficient discussion of the project, and that is fatal to any sound development in human affairs.

The second great problem of the constitutional law of the present is, in my judgment, the proper construction of the upper legislative chamber.

With the exception of the princely power itself this is the oldest among national political institutions. The lower legislative chamber in the states of the present is a modern institution, based upon manhood suffrage, or very nearly that, and upon representation according to numbers; but the Senates are, in most cases, relics of medievalism, based upon a variety of sources as to tenure, and with little pretense of a distribution of the representation according to modern principles. These defects are to be found even in the Senates of some states which have been founded since the close of



the Middle Ages. I think it may be broadly affirmed that of the seventeen states of the civilized world worthy of mention as having a constitutional law, only four of them have solved the problem of the upper legislative chamber with anything like a fulfillment of the demands of modern theory or modern conditions, and these four are not states of the first rank in power. They are Sweden, Norway, the Netherlands, and Belgium. Moreover these four are all states with centralized governments, that is, states which are better situated than those having federal governments for the solving of this problem. Of these four, Sweden has come nearest, in my judgment, to the ideal modern solution, providing, in its constitution, for the election of the senators by the provincial assemblies and the municipal assemblies of such cities as are not under provincial government, all of which bodies are elected by the voters, and distributing the representation in the Senate according to population. This is both conservative and democratic, conservative in the method of the election, and democratic in the method of the distribution of the representation. In the Swedish legislature there is also absolute parity of powers between the two houses, both in the initiation and passage of legislation. Both houses come ultimately from the people, both represent the whole people, both rest upon the same principle of distribution of seats, viz., population, and both exercise the same power in legislation, fulfilling thus the four chief requirements for the Senate of a modern state.

Apparently the Norwegian Senate approaches as near the solution of the modern problem as the Swedish. But a little consideration of the details will show that this is not quite true. The Norwegians elect all of their legislators as *one* body; and when they all assemble as one body, the separation into *two* bodies is effected by drawing lots, one fourth of the whole number constituting in this manner the Senate, and three fourths the other chamber. The main defect in this method of organizing a Senate consists in the fact that the Senate will be composed entirely of members coming from parliamentary districts not represented at all in the other chamber, and *vice versa*; that is, three fourths of the parliamentary districts are entirely represented in one chamber and one fourth in the other. This tends to the sectionalizing of views and to the weakening of the national consciousness and spirit, or, at least, to the hindering of the development of the national consciousness and spirit. Then there is another defect. The one fourth selected in this way and representing directly only one fourth of the parliamentary districts cannot maintain a parity of power with the other chamber composed of members directly representing three fourths of these districts. This is manifest in the provision of the constitution itself respecting the mode of legislation. If the two chambers cannot agree upon



a project of law, the constitution orders that they shall, at last, unite in the one original assembly from which they proceeded and determine the matter there. This means, of course, that after a certain time the Senate must practically always succumb to the will of the other chamber. These are serious defects, so serious as almost to take Norway out of the category of states that have made most progress in the solution of the problem.

The members of the Netherlands Senate are chosen in the same manner and by the same kind of bodies as those of the Swedish chamber, but in the distribution of the seats some consideration is paid to the provincial lines, the distribution not being in exact accord with the principle of population, though not far away from it.

Finally, in the Belgian system, there is a complexity both in the method of choosing the senators and in the distribution of the seats, which amounts to a defect, in each respect. Most of the senators are chosen directly by the voters, and in the election of these, two deputy-parliamentary districts constitute one senatorial district. This is simple and democratic, although somewhat radical. The others are chosen by the provincial assemblies, and in the distribution of these among the several provinces much consideration is had to the provincial lines, the less populous provinces being favored. The purpose of this device is to offset the radicalness of the other part. This is certainly a makeshift. It would have been far more in accord with sound theory to have provided for the choice of all the senators by the provincial assemblies, while distributing the seats among the provinces according to population. There is nothing necessarily undemocratic in the practice of indirect election, but it is quite undemocratic to distribute the seats in any legislative body except in accordance with the principle of population, or at least something approaching that.

When now we turn to the construction of the Senate in the other thirteen constitutions, we find ourselves in the midst of a chaos in the practice with no consistent principle to guide us. Seats by virtue of hereditary right, as, most largely in the British, Austrian, and Hungarian constitutions, and partly in the Spanish, which is certainly medieval both in origin and spirit; seats by virtue of office, as in the same constitutions, which besides being, for the most part, also, medieval, conflict with the modern principle of the incompatibility of office with legislative mandate; seats by royal appointment, as *partly* in the four systems just mentioned, with that of Denmark; as *almost* the *exclusive* principle in the construction of the German Bundesrath, and as the *exclusive* principle in the construction of the Italian and Portuguese Senates, excepting the seats of the princes of the royal house, as a rule, the weakest sort of a Senate, being generally a sort of royal appendage, affording the crown no

support, but bound to go down with it under popular assault; and finally seats by election, practically always in the indirect form, as *partly* in the systems of Spain, Hungary, Denmark, and Great Britain, and the *exclusive* principle in the systems of France, Switzerland, and the American states. The elective element in the British House of Lords and in the Hungarian Magnaten-Tafel is slight. In the Spanish system one half of the senators are elected, and elected for a term of ten years; and in the Danish system fifty-four of the sixty-six members are elected, and elected for a term of eight years. These two are headed in the right direction in so far as the senatorial tenure is concerned.

But in neither of these cases, and in none of the cases where election is the sole source of the tenure, except, of course, the first four already treated of, and, of course, in none of the other cases, is there any approach to the modern democratic principle of distribution in legislative chambers.

It is about as certain as anything human can be that all the species of senatorial tenure, except that by election, will pass away. It may be expected that the tenure by hereditary right in Great Britain and that by royal appointment in Germany will be the last to yield. But they must all go sooner or later, and it is one of the great problems of constitutional law in all of these states to find the proper and natural substitutes for these antiquated forms or these modern makeshifts. It is also a great problem in those states which have already established the senatorial tenure, *in part*, by election, so to reform the senatorial electoral bodies as to make them more representative of modern conditions. As I have said there is no sound objection in modern political theory to the indirect election of senators, but the electoral bodies must be truly representative bodies of the original voters, and they must exercise power in the election proportionate to the population which they represent. This is not the case in any of these. In all of them the original electorate for the senators is much narrower than for the members of the other chamber, and the weight exercised by the different electoral colleges is far from being proportionate to the population of the districts for which they act.

In the five states with republican governments, the ultimate source of the senatorial tenure is, naturally, the same as that of the membership of the other chamber, and in so far as that point is concerned they may be said to have solved this part of the senatorial problem. But when we come to the provisions of these constitutions which relate to the distribution of the senatorial representation, we find ourselves confronted with one of the gravest questions of their constitution law.

Let us consider briefly the facts in each case, beginning with France, as being a centralized government, and not having,

therefore, the same reason for making concessions to the line of local government or administration as states with systems of federal government. The extremes in the senatorial representation are the *Département* of the Hautes Alps and the *Département* of the Seine. From the point of view of population, the mountaineers of the former district are about six times more strongly represented in the Senate than the inhabitants of the highly civilized city of Paris. The average discrepancy, however, is not at all so great. Nevertheless it is true that a minority of the population of France is represented by a majority of the seats in the Senate. It is a minority not far removed from the middle line, but still always a minority. It may also be said that the advantage lies, on the whole, rather with the *Départements* which are moderately populous, although the greatest advantage lies with the least populous, and the greatest disadvantage with the most populous. While there is here a problem for the French statesmen, it is not of a very serious nature. More serious is the problem for them of regulating the weight of the communes in the senatorial electoral college for each *Département*. Here the smaller communes are, as a rule, much over-represented.

When now we turn from France to the states with federal governments, we become immediately aware that, in the distribution of the senatorial seats, other considerations than the modern doctrine of distribution according to population have been in all cases determinant.

In the first place, in democratic Switzerland, we find the Canton Uri about thirty times more strongly represented in the Ständerath, or Senate, than the Canton Bern, and that the population in the twelve least populous cantons, not amounting to quite one third of the population of the whole of Switzerland, is represented in the Senate by a majority of the voices.

Secondly, in the leading state of South America, Brazil, and in the leading state of Central America, Mexico, we find about the same conditions. The Brazilian commonwealth of Matto Grosso is, from the point of view of population, about thirty-four times more strongly represented in the national Senate than the rich and populous commonwealth of Minas Geraes, and the population of the eleven least populous commonwealths of the Brazilian Republic, numbering about 3,000,000 of souls, are represented by a majority of the voices in the national Senate, while the other ten commonwealths with a population of almost 12,000,000 of souls are represented by a minority of the senatorial seats. Likewise in the Mexican Republic, the commonwealth of Colima is, from the point of view of population, about eighteen times more strongly represented in the national Senate than the commonwealth of Jalisco, and the population of the fifteen least populous commonwealths, numbering less than 3,500,000 of souls, are represented in the Senate by a majority of

the voices, while the population of the thirteen more populous commonwealths, amounting to more than 10,000,000 of souls, are represented by a minority of the senatorial voices.

But it is the democratic republic of North America which exhibits the most thoroughgoing rotten borough Senate of any state in the civilized world. In this Union the smallest commonwealth, from the point of view of population, is Nevada, with 42,335 inhabitants, according to the last census, and the largest is New York, with 7,268,894. On the basis of representation according to numbers, the inhabitants of Nevada are about one hundred and seventy-five times more strongly represented than the inhabitants of New York. Again, there are now forty-five commonwealths in this Union, with a population of over 76,000,000 of souls. Of them about 14,000,000 reside in the twenty-three least populous commonwealths, and over 62,000,000 in the twenty-two more populous commonwealths. That is, 14,000,000 of people are represented in the United States Senate by forty-six senators, while more than 62,000,000 are represented by only forty-four senators. Of course, it may be said, and it is said, that in states with systems of federal government the members of the national Senate do not represent the people but the commonwealths of the Union, and that, therefore, the principle of representation according to population does not apply to the Senates of such states. Well, what is a commonwealth or state in a democratic republic with a federal government? Is it anything more than the organization of the people within a given district for their autonomous local government? And is there any sound reason why a few people so organized in one district should be equally represented in either house of the national congress with a great many more people organized in another district for the same purpose? If it were always true that the smaller population possessed all the elements of intellectual and moral culture to a higher degree than the larger, it might be held, perhaps, as a principle of political ethics, that the representation of the smaller number should be relatively stronger than that of the larger. But who will say, for example, that the peasants and mountaineers of Uri are superior in knowledge and virtue to the citizens of Bern, or the miners of Nevada to the inhabitants of New York? I understand only too well that there are still those who will say that the reason for the equal representation of the commonwealths in the national Senate is that they are sovereign states, and that sovereignties are equal in representative right no matter what may be their relative strength in population or any of the other elements of power. My answer to this is that this is a principle of international law, not of constitutional law; that the commonwealths in these four systems which we are considering *are not* sovereign states; that in two of them they never *were* sovereign



states nor anything like sovereign states; that in one of them, Switzerland, the most of them *were* once something like petty sovereignties under the Eidgenossenschaft and the Confederation of 1815-1848, but were deprived of that quality by the Swiss nation in 1848; and that in the other one, the United States, thirteen of them possessed something which they called sovereignty under the Articles of Confederation of 1781-1789, but were deprived of that quality by the national popular movement of 1787, culminating in the establishment of the national constitution instead of the quasi-international confederation, and that by the trial of arms of 1861-1865 the claim to sovereignty by any commonwealth of this Union was put forever to rest.

According to modern views, principles, and conditions, no rule of distribution of legislative seats in either chamber except that of population can rightfully prevail in a national democratic republic, no matter whether the governmental system be centralized or federal. Some concessions can, of course, be made to administrative convenience, but they must never amount to the permanent investment of a minority of the people with a majority of the voices in either branch of the law-making body, especially where this minority, and also the majority, are sectional in their composition and not general. Even if we accept the doctrine of minority representation, it would not justify the practice of sectional overweight, which we are considering.

As I have indicated in another connection, it will not be easy to deal with this problem in the United States and the German Empire. In the other states with federal governments this defect may be cured by the ordinary course of amendment, but in the United States and the German Empire this subject is excepted from the ordinary course of amendment and placed under the protection of a procedure which can, in all probability, never be applied so as to effect any change. Nevertheless, the question will have to be met, and the problem will have to be solved here as well as elsewhere. It may not be done, it probably cannot be done with exact legality, but we have the precedent in American constitutional history for a convention of the United States acting with conventions of the people in nine thirteenths of the commonwealths to disregard the prescripts of the existing law in the amendment or revision of the organic law. We can bring such bodies together by means and through forms already provided in the constitution, and we can go back to the principle, as in 1787, that they are the sovereign *behind* the constitution and are not, therefore, bound by the exceptions from the legal power of amendment provided *in* the constitution. You may call this revolutionary. I think we shall have to concede the point, but it would be a revolution standing on the border-line between original sovereign action and



legal procedure, and would, probably, be as bloodless as that of 1787.

The third great problem of the constitutional law of the present is, as I conceive it, the fixing of the fundamental relation between the legislative and executive branches of the government. The experience of the world has developed three fundamental systems of practice in regard to this subject. We may term them the presidential system, the parliamentary system, and the directorial system.

The principle of the first is substantial independence between the executive and the legislature, both in tenure and procedure. The tenure of the executive does not, according to this principle, originate in the legislature, and cannot for merely political reasons be determined by the legislature; that is, the legislature cannot impeach, or require the resignation of, the executive or his ministers merely on account of political disagreement with them. Nor, on the other hand does the tenure of the legislative members originate in the executive nor can the executive terminate their term by dissolution. Neither the executive nor any of his ministers have seat or voice or vote in the legislative chambers, but, on the other hand, the executive is furnished with a veto power upon all legislative acts practically strong enough to secure his prerogatives against legislative encroachment.

The principle of the second, the parliamentary system, is substantial harmony between the executive and the majority party in the legislature. This is established and maintained by the constitutional requirements upon the executive to take his ministers from the leadership of the majority party in the legislature or the more popular chamber thereof, to follow the advice of his ministers, and to dismiss them from office, generally through the form of voluntary resignation, when they fail to receive the support of that majority upon fundamental questions, or else to dissolve the legislature or the lower chamber thereof, and appeal to the voters to restore the lost harmony, whose decision must be acquiesced in by all. Under this system the real executive is the ministry. It bears the responsibility for the executive acts. Its members have seat, voice, and vote in the legislative chambers, but no veto upon legislative acts.

The principle of the third, the directorial system, is the complete subordination of the executive to the legislature, that is, complete control of the executive tenure by the legislature, entire responsibility of the executive to the legislature, no power of dissolving the legislature or either branch thereof in the executive, no seat, voice, or vote in either of the legislative chambers except by order or permission of the chambers, and no veto upon legislative acts. On the other hand, while the executive is, as a rule, permitted to introduce

measures into the legislature, their defeat or rejection does not call for the resignation of the directory or of that member of it particularly responsible for the project. He or they must simply submit to the will of the existing legislature in every case and go on under its instructions.

The presidential system goes naturally with the elected executive, the parliamentary with the hereditary executive, while the directorial system belongs scientifically nowhere. The directory is scientifically and historically discredited as an executive system. It exists in only one of the seventeen states which I have brought under this study, viz., Switzerland, and seems to be on the way of establishment in one other, viz., Norway, where the successful insistence of the Norwegians that the King's Ministers shall sit in the legislature and shall resign when out of harmony with the legislative majority, without according the King the power of dissolving the legislature and appealing to the voters to settle the question in the new parliamentary election, is certainly tending to make the ministry a directorial board, completely subject to the legislature. Switzerland, being an internationally neutralized state, may make experiments with a weak executive. For Norway such a situation is more dangerous. In both cases it seems to me an unsatisfactory solution of the executive problem and to call for revision.

Of the other fifteen states, all that have hereditary executives, except the German Empire, Austria, and Hungary, have developed into or are developing into the parliamentary system substantially. They are, at least, all moving in the direction of the English model, and are destined to arrive, sooner or later, at something like the English result. All along the road, however, from their present stage of development of the system to its ultimate form, their problems are strewn, and their best course is to look to English experience and follow as nearly as somewhat different conditions will permit in English footsteps. It is most important to kings and emperors themselves that they should recognize the fact that the parliamentary system of relations between the executive and the legislature is a necessary contrivance for reconciling modern political thought and modern political conditions with the hereditary tenure of the executive. If they resist too far its establishment and development, they will simply provoke a republican revolution which will sweep them entirely away. The royal imperial houses of Hapsburg and Hohenzollern, old and powerful and popular as they are, cannot in the long run resist this movement. It is the greatest constitutional problem, from the point of view of their own interests, with which they have to deal, and it behooves them to devote themselves to its thorough comprehension and its rational and natural solution.

With the exception of France, the states having elected executives follow the presidential system, Switzerland not being further considered. This is natural and rational, and I consider that in these the executive problem has been fairly solved to meet modern conditions and requirements. It is quite true that in the United States and Mexico the method of indirect election of the executive is criticised, and that in the practice of the United States the law for counting the electoral vote has, until recently, been quite faulty and is not yet entirely perfect, and that some advantage might conceivably be gained by allowing the presence of the cabinet officers in the houses of Congress to explain proposed executive measures or even to propose administrative measures, but these things are, from the point of view of this paper, matters of detail, and cannot be discussed within the limits of this essay.

It is the French Republic which is confronted with the serious problem in regard to the executive and its relations to the legislature. The French Republic is attempting to work the system of parliamentary government with an elected executive. From the points of view of historical experience and sound theory this appears as an unnatural, and, in the long run, unworkable combination. The real parliamentary system requires, as I have already remarked, not the complete subordination of the executive to the legislature, but harmony of action between the two, and a power in the executive either to dismiss his ministers or dissolve the legislature in order to restore harmony upon important issues when it has been lost. No democratic people will intrust the executive with such power over the legislature, and if they would, the executive would not dare to use it. It requires all the historic power, prestige, and mystical influences of the hereditary executive, the so-called sovereign, to exercise such a power. The French have attempted to help themselves over this difficulty by vesting the power to dissolve the Chamber of Deputies in the President with the consent of the Senate, the Senate itself not being made subject to executive dissolution. This may give the President a certain backing which may enable him to act occasionally. It did so in one or two early cases. But this is no fulfillment of the requirements of the system. The executive *alone* must have the power of dissolution over the entire legislature, at least over the entire elected part of the legislature, and it is not sufficient that the executive shall have it over *only one* chamber of the legislature, and then only when sustained by the *other* chamber. Conflicts between the two *chambers* might be settled in this way, but not conflicts between the executive and the entire legislature, and the settlement of *such* conflicts is the prime purpose of the parliamentary system. When the relation prescribed by the French constitution was established, that instrument provided that the seventy-five

senators, one fourth of the whole number of senators originally chosen by the national convention which framed and adopted the constitution, should hold for life, and that their successors should be chosen by the Senate itself and also hold for life. Here was a certain nucleus of strong conservatism and executive support in the Senate. All that has been changed by the constitutional amendment of 1884, and the members of the Senate all proceed now ultimately from the same source as the Deputies. The French Senate has now arrived at the consciousness of a solidarity of interest with the deputy chamber upon the subject of legislative prerogatives *versus* executive prerogatives, and the power of dissolving the Chamber of Deputies, intrusted to the French President under the more favorable conditions for its exercise just mentioned, has now become practically obsolete. The French system is, therefore, veering towards the directory. This will not serve for France, however it may work in Switzerland or even in Norway. France *must* have a strong executive. If France *will* have a parliamentary system, then France *must* have a king. If, on the other hand, France *will* have an elected executive, then France *must* have the presidential system. This is her great governmental problem. All others should stand aside until this is substantially solved.

The fourth great problem of the constitutional law of the present, as I view these problems, concerns chiefly, if not wholly, the United States. It is the question of extending the legislation of the central government further into the domain of private law, especially in the regulation of commerce and marital relations. The other states having federal governments, except Mexico, and, of course, all the states having centralized governments, have assigned these subjects to the legislation of the general government, and Mexico has gone much further than the United States in this direction.

Whatever may have been natural a century ago, when the settled parts of the commonwealths of this Union were separated from each other by comparatively impassable districts of primeval forest and there was comparatively little intercourse between them, now when these obstacles have entirely disappeared and intercourse is so active that no man knows when he passes from one commonwealth to another, it has become entirely unnatural and scarcely longer endurable that the code of commerce should not be exclusively national. The existence of the common law as the basis of the law of the commonwealths upon this subject has minimized the difficulty of a great nation getting on with systems of local commercial law; but the differences in detail, at first hardly noticeable, have now, on account of the vast development in the complexity of these relations, become almost unendurable. This problem should be dealt with by constitutional amendment if possible. If not, then the



United States judiciary must put a much more liberal interpretation upon the existing commerce clauses of the constitution. The distinctions between commerce "among the commonwealths" and commerce within the commonwealths have now become too attenuated to bear the strain much longer. They must go, or the federal system of government may break down entirely.

It certainly is not necessary for me to enter into any argument at all to show that the scandals of polygamy and divorce, which bring the blush of shame to the cheek of every true American, have their root in the system of local regulation of the subjects of marriage and divorce. These relations are fundamental in the civilization of a nation. Their proper regulation must rest upon the national consciousness of right and wrong. States' rights must give way upon this point, too, if they would stand in regard to those subjects which are not so completely national in their character. In fact, the whole system of federal government, that is, dual government under a common sovereign, is now under great strain, in consequence of the rapidly developing nations and national states. It is a question whether it can stand against the centralizing forces in modern political and civil society. It certainly cannot unless it yields the transfer of some subjects, such as those just mentioned, from local to central regulation. This has been done in Switzerland, the German Empire, and Brazil, and in large degree in Mexico, and these United States must follow the same course of development or witness soon the same sort of a movement in universal reform as occurred in 1787.

The fifth and last great problem, or rather series of problems of the constitutional law of to-day which I shall consider in this paper, relates to civil liberty.

From the point of view of public law civil liberty, as distinguished from political liberty and moral freedom, is the immunity of the individual person within a given sphere against both the powers of the government and the encroachments of another individual or combination of individuals. Constitutional law should construct this sphere, define its contents in principle, fix its boundaries, and provide its fundamental guarantees and defenses. Usually this part of a constitution is called the Bill of Rights, although in its nature it is rather a Bill of Immunities.

Every written constitution in the civilized world, except that of France, contains such a division. Perhaps the constitution of the German Empire ought to be excepted, although the constitutions of the states of the Empire contain such provisions, and the Imperial Constitution itself, in slight measure, contains them. The reason why it does not contain them in larger measure is quite apparent. It is simply because the Imperial Government is one of enumerated powers. This is not a sufficient reason, as we know from American



experience, and the imperial constitution should be amended in this respect, and the Imperial Government made subject to limitations on the one side, and charged with powers against the states of the Empire on the other, both in behalf of individual immunity against governmental power.

The first great problem, however, under this topic, is the French question of amending the French constitution so as to introduce into it a series of provisions concerning the immunities of the individual person. It is quite surprising that the French instrument should be defective in regard to this matter. About every French constitution down to the present one has contained such provisions in much detail. In fact the French taught the European Continental world the doctrine of individual immunity against governmental power as a branch of constitutional law. It was at first thought that the omission of such a Bill of Immunities from the present French constitution was owing to the fragmentary nature of this constitution, but the French have now had nearly thirty years for the perfection of their instrument of organic law, and within this period they have had a constitutional constituent convention and have framed and adopted amendments to their constitution, but nothing of this nature was, I think, even proposed. We are, therefore, driven to the conclusion that the French statesmen and people do not consider such immunities for the individual to be necessary under their present political system, but feel, on the other hand, that, with an elective government in all parts and an executive dominated by the legislature, the individual is in no danger of governmental oppression. I do not know by what lessons of history or of more immediate experience the French have proved this doctrine to themselves. No government is more likely to ignore the natural limits between its powers and the immunities of the individual than an elective democratic government. The French have had this experience, more than once, themselves. I am, therefore, unable to regard this omission as anything less than a grave defect, presenting to the French a most serious problem of constitutional amendment.

As I have said, every other written constitution in the world contains a Bill of Immunities, and it is nearly the same thing as to content in them all, but not a single European constitution provides any means for its lawful realization against the possible attempt of the legislature, and in some cases also of the executive, to encroach upon it, except perhaps petition to the government itself. That is to say, none of these European constitutions creates any judicial bodies vested with the power of interpreting constitutional limitations upon the powers of the whole government, and of restraining the government from breaking through them. Many of them leave

even the *creation* of the judiciary and its investment with powers to legislative statute, which, of course, places the judiciary in a position of inferiority and subordination to the legislature. Others, while creating the courts by constitutional provision, fail to vest them with any such protective power. Even the constitution of Switzerland declares outright that the judicial tribunals shall have no power to pass upon the constitutionality of legislative acts.

The principle of European jurisprudence upon this point seems to be that the legislature is the proper protector of individual immunities against governmental power. In Europe, the title "government" is applied only to the executive, and the statement of the proposition as it presents itself to the European mind would be, that the immunities of the individual are protected against governmental encroachment by the representatives of the people. In America, on the other hand, we consider the legislature to be a branch of the government, and, therefore, it appears to us as a sort of Celtic hoax to speak of the government defending the immunities of the individual against itself. In fact some of our greatest statesmen have contended that the judiciary is also a branch of the government and that we are subjecting ourselves to the same kind of a hoax when we imagine that the judiciary will, in the long run, protect the realm of individual immunity against governmental encroachment. It really appears, at times, as if they were right, and as if the judiciary were really casting its lot with the political branches of the government for the purpose of expanding governmental power at the expense of individual liberty. Still, on the whole, this has not been true. On the whole, a judiciary established directly by the constitution, composed of judges with life terms, sustained by a sound popular knowledge of what the immunity or liberty of the individual purports, and a general popular determination to uphold it, is the best possible organ to be vested with the protection of that immunity against governmental encroachment, as well as against encroachment from any other conceivable sources. It is the only real antidote for the socialistic doctrine in regard to civil liberty. That doctrine, stated in a sentence, is that the individual is subject, *at all points*, to the control of the majority. This doctrine is an absolute negation of the true principle of civil liberty. As we have seen, civil liberty is individual immunity within a sphere marked out by the constitution against governmental encroachment or encroachment from any other source. It is the constitutional realm of individuality. And if in any country all government and every organization and every individual, except only one, should stand upon one side, and the single individual upon the other, it would be the *constitutional* duty of the body charged with the function of maintaining civil liberty to protect that single one within

this sphere against encroachment from any and every source, and to summon the whole power of the nation to its aid, if necessary. And it would be the constitutional duty of those summoned to obey the call and render the aid required, although it might be directed against their own conceived views and interests. The doctrine of the greatest good to the greatest number and the principle of majority rule have no application whatsoever within this domain. When a constitution is being framed or amended, then the question of the nature and extent of civil liberty or individual immunity is, indeed, a matter of highest policy for the *sovereign* to determine in accordance with its own forms of procedure, but once established, it becomes subject only to the provisions and principles of the constitution, interpreted by the organs of justice, and is removed entirely from the realm of legislative or executive policy and majority control. Now the only way to maintain this true idea and principle in regard to civil liberty is to put its protection under a non-political body, — the organs of justice, not the organs for the fixing of policies, — and to vest the organs of justice with the constitutional power to nullify any acts of the political branches of the government which may, in their judgment, undertake to encroach thereon. The legislature, in these modern times, is the branch of the government which is most prone to undertake these encroachments. The legislature is the branch which, by its very nature, regards everything as a matter of policy to be determined, at *each moment*, by majority action, and that action based upon majority will, not upon majority interpretation of higher law. It is the branch of the government which is almost sure to lose sight of the distinction between civil liberty, individual immunity, and what it conceives to be general welfare between justice and policy. It is absolutely certain to do so when a socialistic majority holds sway in the legislature. It was natural that the European peoples, accustomed to the despotism of the executive, with the courts as a branch of the royal power, should have come upon the idea, in the period of the revolutions, — that is, in the period of their transitions from absolute to constitutional government, — that the representatives of the people in the legislature would be the only reliable support for civil liberty. Perhaps this was correct for that period and for those conditions. But I am sure that that period and those conditions have now passed, and that the realm of individual immunity is now in more danger from legislative, than from executive, encroachment. It is under the force of this conviction that I contend that the problem of creating an independent judiciary by constitutional amendment and vesting it with the protection of individual immunity against governmental encroachment, whether executive or legislative, or proceeding from any other source whatever, is one of the chief constitutional

problems now confronting the European states. It will cost some effort to educate the European peoples up to an appreciation of this idea. How far they are away from it may be indicated from the fact that when they immigrate into these United States, because this is a "free country," as they say, they almost always do what they can, when they do anything, to obliterate that great distinction between individual immunity and general welfare, justice, and policy, upon which, more than upon anything else, American liberty rests. The doctrine of the labor unions, which are predominantly European, both in their composition and tendencies, that an individual shall not be allowed to work upon such terms as he may be able and willing to make, because, in the conception of the majority of some labor union, or as for that, of all labor unions, it may be detrimental to their general welfare, is a good example of the profound ignorance on their part of this great American distinction and principle. Difficult, however, as it may be to instill the idea of this distinction into the European mind, still I am fully persuaded that the attainment by the European peoples of real constitutional government depends upon it. The alternative to it is, in the long run, legislative absolutism.

While I hold up the constitution of the United States as the model in this respect, yet I do not pretend that this model is entirely perfect. Two great problems have confronted the American practice during the last fifty years, neither of which has been satisfactorily solved, and I am afraid will not be so solved without further constitutional amendment.

The first has been produced by the contention concerning the meaning of the 13th and 14th amendments, which, with the 15th, make up the constitutional product of the Civil War. There is not much doubt that the intention of the framers of these amendments was to place the entire domain of civil liberty, individual immunity, under the protection of the United States authorities, and to vest the national judiciary with power to prevent encroachments thereon, not only when proceeding from the government of the United States and the governments of the states, but also when proceeding from combinations of individuals within the states. The Supreme Court of the United States has, however, held that these amendments did not extend the protecting power of the national authorities over this sphere to any such degree, but left the original control of the states over this domain unimpaired, except upon the specific points withdrawn by these amendments from that control, and that the national judiciary can protect the individual immunity provided in the 14th amendment only against encroachments attempted by the states, but not against those attempted by individuals or combinations of individuals within the states.



I contend that this is no satisfactory solution of the problem, because, in the first place, in a national state, although it may have a system of federal or dual government, sound political science requires that the entire individual immunity shall be defined, in principle, in the national constitution, and shall have the fundamental means and guaranties of its defense provided in the national constitution. The most fundamental and important thing in any free government is the system of individual immunity. Free government exists chiefly for its maintenance and natural enlargement. The contents of this immunity and the methods and means of its defense should, therefore, be determined by the national consciousness of right and justice. Any other principle than this belongs, not to the modern system of national states, but to the bygone system of confederated states. It was a resurrection of the doctrine of states' rights, in the extreme, when the Supreme Court of the United States put the interpretation which it did upon the new amendments, a doctrine which should have been considered as entirely cast out of this system by the results of the Civil War. This solution is unsatisfactory, in the second place, because it perpetuates the contention between the nation and the states concerning the control of this sphere, while if there is anything in a political system that ought to be made clear and fixed and simple it is this domain of civil liberty. The welfare and prosperity of the whole people depend upon it in a much higher degree than upon any other part of that system. Uncertainty about it and contention over it cannot result, in the long run, advantageously to the average citizen, however it may allow a larger license to the powerful.

The second problem under this head to which I would refer has been produced by the experience of the last six years of the Republic, in what is called its "imperial policy." This problem had to come sooner or later. No country with so high a civilization as the United States can keep that civilization all to itself in the present condition of barbarism or quasi-barbarism throughout the larger part of the world. It must share its civilization with other peoples, sometimes even as a forced gift. This is nature's principle, and no civilized state can permanently resist its demand. It came rather suddenly upon our country, and some of us thought that we were not quite prepared for it, that we had not yet placed our own house in order. But every student and observer of the world's history and the world's methods knows that civilized nations are not, in the great world-plan, allowed to delay the discharge of the duty of spreading civilization until, in their own opinion, they are ready to proceed. Something always happens to drive them forward before they are perfectly prepared and equipped for the great work. And so before the United States had fashioned its constitutional law to meet the



exigencies of a colonial or imperial policy, the possession of insular territory was thrust upon the great Republic. We had to take first, and then, by force of necessity, adjust our political situation to the requirements of the situation. It has not been an easy problem, and no one pretends that we have solved it perfectly or completely. Both the Congress, the executive, and the courts have shared in the work and in the responsibility, but candor compels us to say that if we are to continue in this sort of work, it would be desirable, to say the least, so to amend the constitution as to relieve the different branches of the government from the necessity of making usurpations of power, or something very like it, to meet urgent conditions.

It is only since the 21st of June of the present year that we have been able to state with any certainty what the colonial policy, or imperial policy, of the Republic is. I think it can be now briefly expressed. It is that all of the territory of the North American continent over which the sovereignty of the United States shall become extended will be made ultimately states of the Union, and that all extra-continental territory over which it shall become extended will be made, ultimately, either states of the Union, as possibly the Hawaiian Islands and Porto Rico, or be erected into still more completely self-governing communities than states of the Union, under the protectorate of the United States, that protectorate to be exercised chiefly for the purposes of preventing them from lapsing into barbarism internally or from becoming a prey to the greed of other powers, as Cuba already, and later on the Philippines. This is a policy worthy of the great Republic. It is the true imperial policy for a great civilized state engaged in the work of spreading civilization throughout the world. In comparison with it, the colonial policies of other countries appear mean and sordid and altogether lacking in the element of altruism necessary to real success in executing the mission of civilization.

Following such a noble policy as this, it is not difficult to forecast something of the future of this country. I would venture to say that the child is now born who will see the states of this Union stretching from the Isthmus of Panama to the North as far as civilized man can inhabit, peopled by two hundred and fifty millions of freemen, exercising a free protectorate over South America, most of the islands of the Pacific, and a large part of Asia. We possess already the extremes of this vast continental territory as well as the great heart of it, and the most important Pacific islands, and we have already a footing of influence in Japan and China hardly enjoyed by any other power. The exalted policy which I have declared to be the imperial policy of this nation cannot fail to extend that influence, prestige, and power almost beyond measure.

Do not understand me as claiming the development of such a policy for the party at present in power in Congress and the present administration without the aid of their party opponents. I am not at all sure that, in the immediate enthusiasm of victory, and under the necessity of exercising temporary absolutism in government in the newly acquired territories, the party in power would not have lost sight of the real purpose of their work in the world's civilization except for the earnest expostulations of their opponents calling them back to the contemplation of the historic principles of the Republic. I rather fear they would. This noble policy is, therefore, the resultant of two forces rather than the direct product of one. It is the policy of the nation rather than of any party within the nation or of any part of the nation. As such it is sound and true and unchangeable, and is destined to be pursued no matter what party shall hold the reins of the government.

But we have some constitutional difficulties in the way of the realization of this policy. These difficulties relate to the constitutional powers of the United States Government and the limitations imposed thereon in behalf of individual immunity within newly acquired territory. It is settled that the United States Government may acquire territory for the United States by treaty or conquest; that it may set up a temporary military régime therein against which there is no constitutional immunity for the individual; that it may relinquish possession of the same to its own inhabitants or another power, either absolutely or under such conditions in the form of a treaty as may be agreed upon by the parties, and may enforce the stipulations of the agreement in such ways as may have been agreed on, or in such ways as are recognized by the customs and practices of nations; or that it may perfect its acquisition and transform the temporary military despotism therein into such civil government as Congress may establish, under the limitations of the constitution in behalf of civil liberty. I say that these points are all well settled. But there is some question about the power of the United States Government to exercise a protectorate over peoples occupying territory which is not a part of the United States, especially when that protectorate shall not have been established by treaty and shall not be exercised under the forms of international agreement or custom. There is not a word in the constitution expressly authorizing it, and it is a grave question as to whether there is a word from which such power can be implied.

Moreover, it has appeared desirable, perhaps I should say absolutely necessary, to the United States Government to make the transition from military despotism in the government of some of these new acquisitions to a first and temporary form of civil government without constitutional limitations in behalf of individual liberty,

that is, to a temporary civil despotism or something of that nature, and for this it is extremely questionable whether there is any warrant in the constitution. In order to meet the wishes of the government, or perhaps the necessities of the government, in this respect, the Supreme Court of the United States has so strained its powers of constitutional interpretation as virtually to enact, in the opinion of a large number of the best citizens of the country, constitutional legislation,—constitutional legislation, too, which, upon one point at least, contradicts the prime purpose of the only legitimate imperial policy which a free republic can have. It is quite possible that the state of society and of the population in a newly acquired district may necessitate more summary judicial processes than those of the juries, and that public security and even individual liberty will be better protected under the more summary forms, and that, therefore, a judicial interpretation of the constitution relieving the government from these limitations as to process in such districts would have a moral ground at least to stand on, but when the court allows the Congress to overstep the constitutional limitations on the government in behalf of the freedom of trade and intercourse between the people of such districts and the people in other parts of the United States, and to erect a special tariff against such trade and intercourse and thus to destroy, or at least greatly weaken, the prime means of extending civilization to the inhabitants of such districts, viz., a free commerce in mind and things, then neither the court nor the Congress nor the administration has any ground of any sort on which to stand, and we need an amendment to the constitution to express the reason and the will of the sovereign upon that subject.

We have in this whole question of territorial expansion one of the greatest problems of the constitutional law of this Republic, one which affects the whole world. It affects first of all the Republic itself, because upon its rightful solution depends the moral right of the Republic to have any imperial policy at all. It affects the peoples of the dark places of the world, who, though apparently unable to secure the blessings of civilization for themselves, certainly have the right to be left in their barbarism unless the intruding nation comes with a chiefly altruistic purpose. And it affects the other civilized powers in the example which it shall furnish them for their own work in the spread of civilization, for if the great Republic pursues an egoistic policy, they will certainly do likewise, and it is to be hoped that if it takes the other and the true course, they will not go in the opposite direction. No grander mission can be imagined than that which is now open to this American nation, and the time is now ripe for the sovereign people to discuss it in all its bearings, independently of ordinary party politics, and to write in the consti-

tution the methods and means which the government may employ, the purposes which its activities must subserve, and, above all, the limitations upon the government in behalf of the civil liberty of every individual who may be brought under its jurisdiction or protection in realizing this transcendent mission, the civilization of the world.

# THE SEPARATION OF POWERS AND THE JUDICIARY IN FRANCE AND THE UNITED STATES

BY FERDINAND LARNAUDE

(Translated by Maurice Léon, Esq., of the New York Bar)

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I APOLOGIZE for having to address you in French, but I speak so little of your language that I fear, if I should express myself in English, it might result in a mishap similar to the one which befell President Montesquieu, the illustrious author of *L'Esprit des Lois*. He attempted to engage a nobleman, whom he was visiting during his sojourn in England, in a conversation, and addressed him in English; his host solemnly answered, "Did I not tell you, sir, that I cannot understand French?"

I also apologize for bringing before you too hasty and improvised a communication. Invited to your Congress too late, and compelled, in order to reach here in time, to start without having a chance to think over my subject, or even selecting it, I have had to prepare my address on board the steamer which brought me to these shores, with the pitching and rolling of the liner to assist me. Under these circumstances my address will necessarily bear the marks of its origin; it will be like those children who have had an infancy of ailment and who remain weak and puny all through their lives.

It is now somewhat over a hundred years since the principle of the separation of powers was introduced in constitutional and common legislation, both in the United States and in France. What has come out of this principle? How did it fare on coming in contact with facts? What is its present standing? Would Montesquieu recognize it under the various forms, I might say disguises, which it has assumed? Or would he complain that his great invention had



become deformed? Lastly and particularly, have the United States and France obtained out of the principle identical or different results?

The answer to these questions would be too long if all the phases of the problem were to be examined, be it only as to their most salient characteristics. The separation of powers is connected with everything or almost everything, and a whole treatise of constitutional law could be written under that title.

I propose to cover but a very limited portion of this extensive field of study. Laying aside all that relates to government, administration, and legislation properly so called, I will confine myself to the judiciary, specifically considered from the point of view of the separation of powers. I wish to determine to what extent at the present time its organization and operation are in harmony with the deductions which seem to be logically implied in the famous rule laid down by Montesquieu, and I will especially endeavor to explain the characteristic differences which, both in the letter of their respective constitutions and laws and in actual practice, distinguish the American separation of powers from the French separation.

### *Summary*

- I. Nature of the Judicial Power.
- II. Organization of the Judicial Power.
- III. Working of the Judicial Power.
- IV. Summing-up and Conclusion.

## I

### *Nature of the Judicial Power*

From the outset we are confronted in France with a first question of a purely theoretical order, with which you are not acquainted, and this constitutes the first contrast between legal conceptions in the two countries. Our authorities wonder whether the judicial power is actually a power or whether it should rather be in itself looked upon as a branch of the executive, the latter making up with the legislative the only two powers which legal analysis can find in the state, namely, the power which makes the law and that which enforces it either judicially or administratively. And this is not only a doctrinal conception, more or less scientific, but the idea has been expounded in certain legislative discussions during the Revolution, in those memorable debates of the Constituent Assembly in which the principles of public law found such eloquent interpreters. Moreover, certain of our constitutions seem implicitly to sanction this solution. It is not my purpose to take sides in a controversy of a merely theoretical character. I shall only point

out that it does not exist with you. No discussion on this point has ever been raised in your country, so far as I know. Neither in the text of your federal constitution nor of your state constitutions, nor in Hamilton's letters in the *Federalist* on the analysis of the judicial power, nor in the opinions of American judges, which form such remarkable disquisitions on constitutional law, is the least doubt expressed as to the existence of an actual judicial power.

The reason for this difference between the United States and France we shall find in the fact that there have always been close relations between the courts and the government in France. Some of our monarchical constitutions expressly state that justice was administered "in the name of the King," or "in the name of the Emperor." Judges were appointed by the executive, the Minister of Justice, and the prosecuting magistrate who, in so many respects, is under the control of the government, exerted a constant influence over the courts. As a consequence of these facts, which seem to be inconsistent with the existence of a distinct, autonomous, and separate judicial power, very naturally there set in a tendency to consider the judicial power as a mere branch of the executive. This was a way of reinstating logic in the relations of the executive with the courts, and of doing away with the necessity of explaining certain peculiarities of the judicial organization. It is indeed something of a defect, I would even say a monomania, with jurists to endeavor to introduce logic everywhere and to bring everything down to simple ideas, whereas facts, which in this case are represented by texts, laws, and regulations, often do not lend themselves to these abstract and sometimes very unreal generalizations. On the contrary, the organization and power of the judicial department in your country have always been such as to keep free from any of these contradictions, which after all are only apparent. Nobody, therefore, has ever thought of setting forth a claim that this power, the oldest function of the state, is not a real power.

## II

### *Organization of the Judicial Power*

The subject of the organization of the judicial power leads us into a less doctrinal and more practical realm.

Here again we shall find several contrasts between the two countries. They have not understood the separation of powers in the same way. To begin with, this separation seems to have a bearing upon the very question of the selection of judges. In countries which, like the United States and France, hold the principle of the sovereignty of the people as the foundation of their institutions, should not the elective system be considered as the only mode of

selection admissible under the combination of these two controlling principles?

Such was the rule laid down by early French constitutions; the monarchical constitution of 1791 as well as the republican constitution of the year III, and most of your state constitutions followed the same rule quite promptly in the course of the nineteenth century. Your Supreme Court and federal court justices have, on the contrary, preserved the system of appointment by the executive, and it is this system which France also adopted after having made an experiment which was not attended by success.

It is indeed beyond doubt that the system which logically seems to be most in keeping with the principle of separation of powers conjointly with that of national sovereignty is the system of election. This logic is lacking in the French law, but American legislation has conformed to it only partially. Neither you nor we, therefore, are logical in the end. We unquestionably violate both the principle of separation of powers and that of the people's sovereignty.

What is, however, to account for the fact that no judge is elected in our country, while practically all of your state judges are designated by election?

No legal explanation can be offered, but history and politics supply us with the explanations not to be found in the law.

If the elective method has not been kept up in France, this is not only due to the unsatisfactory way in which it had worked, but mainly to the fact that the executive power became strongly organized under the Consulate and the Empire and that it looked upon the appointment of judges as one of its essential prerogatives. Subsequent governments, even republican governments, saw to it that such a powerful means of influence was not impaired in their hands.

Things went differently with you, and the cause for this divergence is to be found in the steady, uninterrupted development of the elective system in your country, which logically extended to nearly all public offices; there was no reason why judicial functions should have been excepted.

This may, perhaps, be a democratic error, but it is a genuinely democratic conception.

The logic of election has led you still further. Since elections were resorted to for the choosing of judges, by virtue of its principle it could only make temporary judges. We, on the contrary, have borrowed from the system of venality of offices, as existing in the old régime, the rules of life tenure and irremovability. This was a restraint put upon the executive power in the exercise of its usual prerogative over the officials appointed by it, I mean of its right of removal. But the limitation has served the interests of justice if it has not always been in accord with political interests.

There, doubtless, lies a most difficult problem in this matter of the appointment and promotion of judges. Elective methods have not given good results in France nor do they present such in your country. But neither is appointment by the executive, on the other hand, so very satisfactory, especially if it is considered that no magistrate can *in fact* be appointed without numerous recommendations from members of parliament, as is at present the case in France; that no appointment can be made without the approval of the deputy of the electoral district; and lastly, that the magistrates depend for their promotion on the ability to conciliate these many and sometimes hostile influences.

The formula of the separation of powers alone cannot remove all these difficulties. It can, however, be of great assistance towards the solution of the problem, inasmuch as it shows us that its application is conditioned upon the organization of a body of judges who shall have nothing to fear from the electorate, the executive, or the representatives of the people, a body of upright, learned, and independent men.

### III

#### *Working of the Judicial Power*

Here it is that the contrasts between the United States and France are most conspicuously revealed.

The principle of separation of powers has begotten very different results in each country, in the way that a tree transplanted in a different climate yields fruits more or less savory than in the country where it originally grew and slowly developed with its special features.

Let us look successively for the demonstration of this idea into the relations of the judiciary with both the executive and the legislative.

(1) *Relations between the Judicial Power and the Executive Power.* The Americans and the French have conceived the relations between the judiciary and the executive from entirely opposite points of view.

The executive is vested with powers which enable it to interfere with the functions of justice; it exercises them through the prosecuting officers and occasionally through the Minister of Justice and even through the prefects, notwithstanding the fact that the latter are functionaries of an essentially administrative character. This is the first encroachment upon the principle of separation.

This principle is, on the contrary, most strictly applied on the judicial side. The courts which undertake to enforce the law against a member of the administration are divested even of their normal attributes.



The French system, we must say at the outset, is, above all, an historical product. The separation of powers with us did not so much proceed from Montesquieu as from the old French public law, in which it slowly and laboriously assumed its specific characteristics during the struggle between the monarchy and the parliaments. This system in its essential features may be described as follows:

The courts which we call judicial, that is, the courts proper, which alone constitute the judicial power, may not take cognizance, except in a few cases, of the differences arising between the administration and citizens. Now we must point out that these differences occur very frequently on account of the considerable importance of the administration in our country and of the many ways in which it comes in contact with citizens. The courts may not interpret any administrative act, nor look into its execution, nor declare it void. And if the court attempts to do this, deeming itself within its jurisdiction (which may well be the case since this jurisdiction does exist in some exceptional circumstances), it is disqualified by the authority of the administration itself which aroused the *conflict*.

Now who is to solve this question, that is, decide whether the matter should be submitted to the courts or to an administrative jurisdiction? This decision for a long time rested with the executive, a fact which affords further evidence of the special character of the French separation of powers entirely directed against the judicial power. Since 1872 this duty has belonged to a special court, called the *Court of Conflicts*, in which both the ordinary courts and the administrative jurisdictions are represented, but which may be presided over by the Minister of Justice. The executive power is, therefore, still endowed with a preponderating position in the Court of Conflicts.

Let us suppose now that a question in regard to jurisdiction has been decided against the court. The matter is withdrawn from the latter's hands forever. But who shall try it? For tried it must be! This mission will devolve upon the administration itself, which then takes the name of administration of litigation, signifying an administration clothed with a judicial capacity. It will exercise these functions through the prefectural councils and the state council, organs half judicial, half administrative, whose members are not protected by the privilege of irremovability, the real touchstone for judicial courts. The separation is thus carried to its extreme limit. The case is similar when it becomes necessary to prosecute an administrative agent for a dereliction committed in the exercise of his functions. The court cannot take cognizance of this matter of liability unless the dereliction is so gross as in some way to deprive the administrative agent of the capacity which protects him and to transform him into a plain citizen amenable to



ordinary law. Otherwise the case is taken away from the court, as, indeed, in order to pronounce a judgment on a question of liability, the court would have to construct an administrative act, which it may not do. Such is the system in force at the present time. Up to 1870 the prosecution of officials who had rendered themselves liable was provided for in a different way. It was permitted, if authorized by the state council (Art. 75 of the Constitution of the year VIII). The leaders of the revolution of the 4th of September hastened to suppress this rule which had shielded the worst excesses of the administration under the Second Empire. But French public law soon became disorganized through this abrogation, and the administrative jurisprudence revived the old rule of administrative guaranty under another form; it claimed that the principle of separation of powers would be violated if the courts had to pass judgment on cases of liability incurred by a functionary, as they would necessarily be taking cognizance of an administrative act.

This distrust of the courts which is shown by the administration and the jealous independence which characterizes the latter is, we cannot repeat too often, only to be explained in the light of history. What has been introduced in France is not the separation as described by Montesquieu in his immortal chapter VI. But the new public law has retained the principle of separation as contained in the old public law by giving a legal character to what was only an administrative practice, and by making of it an institution with peculiar and well-marked traits. The embryo, shapeless at first, and slowly developed in the last centuries of the French monarchy, resulted into the sharp formula set forth by the Constituent Assembly.

The men of the Revolution who had received their legal education from the old régime and who had been present at the struggle of the parliaments against monarchy, simply held on to the administrative practices introduced by the King's Council and the intendants. These practices constituted the law at the time when the Revolution broke out, and were sternly enforced in a manner which could not be opposed and which had totally suppressed every resistance.

Your conception of the relations between the judiciary and the executive is not of the same nature. Your courts may take cognizance of any litigation raised by the enforcement of the laws, even when the administration is a party to it. You are not acquainted with administrative jurisdictions; your courts may even serve injunctions upon the administration, ordering it to take such action as is required by law for the benefit of the public, or to discontinue any unlawful action. As to the liability of officials, it rests on quite different foundations, which it is unnecessary for me to point out; you know them better than I.

What I am here to investigate is the reason for this difference from the French conception of the separation. The reasons are invariably the same. Your historical traditions are on this point totally at variance with ours. The English judicial régime did not know the struggle between monarchy and the courts of law. Political struggle never took place in the judicial domain, while the latter unfortunately was the only ground which remained for it in France. In England political struggle existed only where it belonged exclusively, that is, in political bodies. It is due to this fact that the principle of the "rule of law," with absolutely general application, could, without difficulty, be maintained both in England and in your country, even when it had to be exercised against the administration.

If, however, the two systems were to be subjected to a critical test, the French system, such as it has grown out of many and happy improvements, could perhaps bear a favorable comparison with the Anglo-American system.

Administrative judicial bodies, on the one hand, have come to be real courts, subject to fixed rules and to a regular procedure, and sitting with as much independence as judicial courts have. On the other hand, these judicial bodies, which include past or future administrative officials, are, on this account, composed of specialists quite familiar with administrative matters; this is not an undesirable condition, since it can only redound to the benefit of the accused. Lastly, owing to their intimate connection with the administration, such judicial bodies are able to go further than any court could into the details of administrative action. I cannot unfortunately submit any evidence of the above assertions, for it would demand from me more time than I have at my disposal to lay before you the famous theory of "appeal on the ground of excessive use of power," an admirable creation of our highest administrative judicial body, the state council, which presents a more effectual protection for individual rights than can be afforded by any other system.

It will suffice that I have pointed out the existing contrast between your separation and ours in regard to the relations of the administration with the judiciary, and that I have indicated the causes for such a contrast.

(2) *Relations between the Judiciary and the Legislative.* Here again the same causes have produced the same effects. The French separation of powers is as different from the American separation in regard to the relations of the judiciary with the legislative as in regard to those of the judiciary with the executive.

Proof of this I shall seek in the consideration of the well-known question of unconstitutionality of laws, which, from a legal standpoint, is brought under the same conditions in France as in the United States, the two countries living under written constitutions.

All the courts in your country, from the lowest to the highest, have the right to hold as void and unenforceable any law adjudged by them to be unconstitutional. It has never been possible to introduce this rule in France. Attempts have vainly been made to have it adopted by the courts, in view of the lack of definiteness of texts at hand. But the courts have never dared to go such a length. Bills have been introduced aiming at embodying it expressly in legislation; they never have, and probably never will, come up for discussion. A few authorities only, very few indeed, contend that our laws imply a sanction of the rule of unconstitutionality; this, however, seems to me really a paradox.

How does this new contrast between American and French institutions arise? Can we find any rational explanation for it? No. History and politics alone can furnish a key to the problem. Here again the soils on which the seed of separation was sown have produced plants quite different in character.

Doubtless the French rule, if looked upon from the standpoint of law and abstract logic, is incomprehensible and unaccountable. Your great Chief Justice Marshall has shown in a definite way, in the famous case of *Marbury v. Madison*, that the American rule is based upon all unshakable legal foundation. Whenever in a country there exists a written constitution, there also exists, by virtue of the same fact, a legislature with limited powers. The written constitution assigns to the different powers their respective spheres of action. It shuts them up in a circle which neither the legislative nor the executive are allowed to overstep under penalty of forfeiting their powers, and when a parliament violates a constitution by passing a law which contradicts one of its provisions, it takes the position of an agent who would exceed the terms of his agency; the agent would perform an act which is null and void, for he is no agent and has no representative character beyond the scope of his agency. So with a parliament. If it ignores the constitution, it is no longer a parliament and ceases to be a representative body.

This is perfectly true on grounds of law. But history and politics furnish a most satisfactory explanation of this difference between the French and the American constitutional law. It consists in this: that the former has put the separation of powers to a use which was not recognized by the latter. As a matter of fact, it is upon the principle of separation as much as, or even more than, upon texts, which we must confess are rather ambiguous, that the right of the courts to withhold the enforcement of an unconstitutional law is denied in France.

I shall not presume to teach you the historical origin of the American system. I myself studied it from American authors, and especially from Professor Thayer of Harvard, whose death is a loss to

science, and to whom you will allow me to render the tribute of my homage. I learned from him that the American rule proceeded from the English origin of your judicial institutions, from that wide range of competence of the English courts which permitted them to pass decisions on all public and private matters, and also from the colonial judicial régime which prevailed before the proclamation of your independence.

The French rule, on the contrary, was derived from the same source that restricted the jurisdiction of the courts in regard to the acts of the administration.

The men of the Revolution had been the spectators of the struggle between the parliaments and the King towards the end of the monarchy. They had noticed that, in the last years of the eighteenth century, the parliaments had attempted to prevent the King from carrying out reforms demanded by public opinion and indeed had sometimes succeeded in doing so. Such reforms could not be executed through enactments of the council, which for a long time past had been free from the interference of the judicial bodies; the King was compelled to carry them into practice through edicts, ordinances, and declarations for which the sanction of the sovereign courts was indispensable. Indeed, the aim pursued by the men of the Revolution was to prevent the judicial bodies which succeeded the parliaments from resuming the warfare against the political powers, the legislative as well as the executive.

Thus, it appears, Montesquieu's theory was not applied, but the rules in process of elaboration in our old public law were taken up, sanctioned definitely, and formulated in terms of greater precision; doubtless they were not laid down with as much precision as the rules applying to the executive, but we shall find them sufficiently precise, especially if we look upon the matter from the point of view of the spirit of the institution itself.

Nor should it be overlooked that the Revolution achieved both socially and politically the most wonderful reforms ever recorded in history, and that in the midst of unheard-of difficulties it introduced new principles forcibly, although they clashed with numerous and considerable interests. How could these men who wished to transform society, and who succeeded in so doing, put up with a rule so apt to prove a hindrance to their progress?

The objection might be made that the special circumstances under which the political powers were striving in the advent of new ideas are now over. Why, then, shrink from adopting the American system, the only one which can logically be derived from the theory of written constitutions?

All attempts made in that direction have so far failed, as I have already stated. They have failed everywhere, in France and in all



such European countries as are provided with a written constitution and in which the question arises under the same conditions as in France. There are only two exceptions in Europe that I know of. In Norway and Greece the courts may withhold the enforcement of any unconstitutional law. But while this rule has numerous and far-reaching applications in the United States, even in the domain of political and social reform, the rule of unconstitutionality has but little importance in the two above-mentioned countries. I asked some Norwegian and Greek jurists to let me know of decisions on this point, and they were hardly able to discover more than a few judgments, relating to cases of strictly private nature and involving no issues of widespread interest.

There must, therefore, be a special and very powerful reason for the maintenance of so illogical a rule everywhere except in the United States and the South American republics, which have merely copied your constitution.

The real reason for it is entirely political in character. Your "exception of unconstitutionality" is a main piece in your system of government, in your constitutional machinery. It is rather a political than a judicial rule. I do not, of course, deny that it is a protection for the rights of the individual and a very efficient guaranty of the liberties of the citizen. But its political character overshadows its judicial side. The matter is political, while the form is judicial.

This feature was already noticed by our great De Tocqueville, the illustrious Frenchman who was the first European to attempt a description of your institutions, which shows such lofty views and such a remarkable acuteness of analysis. "The American judge," said De Tocqueville in his *Démocratie en Amérique*, "is just like all judges in other countries except that he is clothed with immense political power."

Now, neither in France nor in any other country of old Europe governed by a written constitution, is there any disposition to give the courts "immense political power." In such countries, which either possess or slowly drift toward a parliamentary organization, there exists no desire and no possibility to limit in such a manner the province of the legislature, which is the political power *par excellence*, and which your state constitutions tend, on the contrary, to confine in an ever narrower circle.

The parliamentary régime has its own rules, its inward logic; it represents a special type of government in the broad sense of the word. The system for which your constitution stands is of a very different type, with its elected president, its secretaries placed beyond the control of the legislative power, its standing Senate and House committees, its conventions, and lastly, its rule of unconsti-



tutionality. To repeat a comparison used by Mr. Boutiny, who has an excellent acquaintance with the spirit of your institutions, we must picture to ourselves these two types of government as "two animal species quite removed one from the other." It has been scientifically proved that any attempt to cross animal species removed from one another yields but poor results. No better results could probably be secured by attempting to mingle these two types of government.

It is in vain that we have a written constitution and that we proclaim very loudly the distinction between the constituent powers and the constituted powers; in practice we act as though we had a parliament invested with a paramount authority. The reason as stated above is that parliamentary government labors under its own logic and leads inevitably in fact to an almost all-controlling authority of parliament, even if there exists a written constitution. Legally our parliament is not sovereign; politically and practically it is.

I do not think, therefore, notwithstanding the contrary opinion held by a number of my fellow citizens, that it may be possible or even desirable to adopt your "exception of unconstitutionality."

You export bicycles, and especially agricultural implements, into France, and your Chicago manufacturers flood our country with these products, with which we are very well satisfied. But the exception of unconstitutionality would not be a good article of importation into France.

Another equally potent reason which causes us to exclaim "*Timeo Danaos et dona ferentes*" is the fact that the judiciary would be the power which would suffer most thereby. It would soon become disorganized, thrown out of balance and upset by the unwelcome present thus made to it. The gain for politics would be but trifling, while the judiciary would most assuredly be the loser in the transaction.

#### IV

##### *Summing-up and Conclusion*

To sum up and conclude:

(1) The separation of powers is merely a formula, and formulas are not working principles of government. Montesquieu had chiefly aimed to indicate by his formula the aspirations of his times and country. He could not and did not wish to propose a definite and permanent solution of all the questions brought up by the government of men and their long-felt longings for fairness and justice.

(2) The separation of powers since this conception was first

launched into the world has been what M. A. Fouillée, one of our most eminent philosophers, calls an *idée-force*, an auto-dynamic idea. It has sought its fulfillment in facts, by embodying itself in positive constitutions and legislations, but it has not altogether succeeded, its progress being checked by obstacles thrown in its path by historical events and practical necessities.

(3) The separation of powers has produced very different effects according to the countries where it was introduced. The seed has produced plants materially diversified in character according to the soil where it was sown. There is nothing in such a fact to be wondered at. A people is dominated by its history, its traditions, its own mentality slowly developed, its economic, religious, and social conditions. Hence no absolute similarity can exist between two institutions established in different countries, unless it be in the letter of their constitutions and laws, although they may be controlled by the same idea.

(4) The separation of powers in its strict and absolute sense is neither desirable nor even practicable.

The powers of the state in their operation must necessarily come frequently into mutual contact. Certain authors, mostly jurists, are wont to indulge in a very mistaken method of handling this question. They grasp the abstract conception of separation, isolate it, and put it on a pedestal; then they draw from it all the strictly logical inferences implied in the pure idea. On such grounds they condemn all rules of positive law which from a logical and abstract standpoint contradict their deductions.

This method is extremely dangerous in public law, nor is it a perfect one as affecting matters of civil law. Legal formulæ should not be esteemed above life itself. On the contrary, they should keep pace with the latter and fashion themselves in accordance with it, for law is only a form which creates nothing, but has the object of imparting strength to institutions called into being by certain needs which exist and expand outside of it.

(5) Separation and independence seem to be a more marked tendency and a stronger need for the judiciary than for any power of the state. The reasons for this may be stated as follows:

First, the law of specialization. There are no functions which demand a greater degree of technical, special, and professional knowledge than those of a judge. Nobody would ever think of calling upon a dock-hand or a man who slaughters cattle at Armour's in Chicago to draw up plans for a house, a bridge, a locomotive, or an automobile, as these men have qualified themselves neither by study nor practice for such a special work. It would be just as unreasonable to withhold the recognition of this necessary law of specialization in the working and organization of judicial agencies.

And I will remark in passing that it constitutes the true safeguard against the greed and the destructive and disorganizing genius of politicians.

On the other hand, it is of paramount importance, through an adequate organization and operation of the judicial power, to insure the protection of private interests, matters of family, property, individual freedom, honor, in short everything which is closest to one's heart in this world. It is, therefore, impossible that the principles applying to the organization and working of either the executive or the legislative, which are only connected with questions raised by public interests, should also apply to the organization and working of the judicial power.

With these words I shall end my too lengthy and yet quite insufficient address. The ideals of justice and politics are essentially different. As a consequence, it is indispensable, in organizing and carrying out the powers of the state vested with the attributes corresponding to these various functions, not to disregard the inward necessities arising from the peculiar character, the organic nature, as it were, of each power. Particularly in regard to the administration of justice we must never forget this beautiful definition of justice: *Justitia est constans ac perpetua voluntas jus suum cuique tribuendi*. This is the motto of the judge, the only one to which he should look for his inspiration and guidance, and we should condemn any organization which would disregard that motto, either by making too stringent an application of the separation of powers, or by getting too far away from it. *In medio veritas*.



SECTION C — PRIVATE LAW





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(Hall 14, September 23, 3 p. m.)

CHAIRMAN: PROFESSOR JAMES B. AMES, Dean, Harvard Law School.

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### JURISPRUDENCE AND LEGISLATION

BY ERNST FREUND

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THE arrangement of jurisprudence, in the classification adopted for this Congress, under the head of Social Regulation, recognizes the practical purpose by which this department of learning is dominated. Since it is the professed object of the private law to harmonize the rules of justice in individual rights and liabilities with the changing needs of society, it is proper, in a paper dealing in a general way with the relations of this branch of the law, to consider the methods of its system mainly with reference to their adaptability and success in serving that end. The private law has developed partly through the administration of justice, and partly through legislation, and it is, therefore, natural to distinguish between these two agencies of development in tracing the relation of scientific method and system to the problems of policy and justice.

#### I

We speak of a legal system when rules are consciously founded in principle and when principles acquire cohesion by impressing the mind with their interrelation and common purpose. This unity is strengthened by the recognition of authorities which furnish standards and analogies of legal reasoning. This intellectual bond, far more than distinctness of political jurisdiction, serves to differentiate one legal system from another. The writings of the jurists in Rome, and later on the *corpus juris* both of the civil and of the canon law, the great body of English case law, the treatises of Littleton and of Blackstone, of Pothier, of Savigny, and of Wind-

scheid, may be mentioned as either constituting legal systems, or as having contributed powerfully to their formation. On the other hand, a system may or may not be coextensive with political jurisdiction. In England for a long time common and civil law had each its province of application; to-day the two systems ignore international boundaries; the Mahomedan law spreads over numerous countries, and the French Code of Commerce furnishes a system of commercial law to most Latin nations. The law as a system is a body of reasoned principles, and not of sovereign commands.

In any system of private law it is possible to differentiate, with tolerable clearness, principles and institutions according as they are strongly marked by considerations of public policy, or are mainly abstract and technical in their character.

It is not a derogation to the dignity of legal science to assert that the bulk of its work has always been given to the production of rules of the latter category. Jurisprudence — and in this it differs from political economy and sociology — is the direct outgrowth of a practical demand. It is its business to minister to the dispensation of justice, and the justice of the courts, in the vast majority of the cases in which it calls for constructive legal work, has to deal with close controversies turning on the precise demarkation and boundary lines of institutions and principles, and taking their essential nature and larger aspects for granted. Not unnaturally the character of the private law is dominated by the habitual trend of professional thought, and this again is controlled by the exigencies of professional practice. The result is the dry and colorless complexion of the private law with which we are sufficiently familiar.

This aspect of the law is accentuated where it is developed chiefly, perhaps almost exclusively, through its administration, as was the case in Rome and in England. The main characteristic of such a system is apt to lie in the wealth and refinement of its technical distinctions, and in its consequent availability as an arsenal of weapons for the forensic contest. It is true that the eulogists of the common law dwelled mainly upon its fundamental policy in protecting the liberties of the subject; but this was simply an identification of the common law with the English constitution for the purpose of making a contrast with the countries of the civil law which were formerly living under more or less despotic governments.

The general attitude of the professional mind toward technical problems, and, therefore, the essential character of legal science, is the same in different systems, although the controlling agencies of development may differ considerably. Juristic authority in Rome was lodged with professional advisers, in England with the courts,

but the result in both systems was practically case law. We are apt to regard as the distinguishing characteristic of the common law the authority of precedents. What Coke said of the civil law three hundred years ago, that "there be so many glosses and interpretations, and again upon those so many commentaries, and all these written by doctors of equal degree and authority, and therein so many diversities of opinions, as they do rather increase than resolve doubts,"<sup>1</sup> is in a measure true to-day; but the resulting difference is one of certainty and not of kind. The German jurists of the nineteenth century, it is true, introduced new methods of legal science by seeking to reduce legal principles and concepts to their simplest elements in logic and metaphysics with a view to laying the broadest possible foundation for legal reasoning; but their dialectical efforts have, on the whole, proved barren of practical value. In the main, the type of mental activity characteristic of legal science is thus fairly uniform and constant.

Within the close range of unsettled law there is little room for large and striking questions of policy, and in the few cases in which they do arise, the courts, in deference to the theory that they do not make law, rather argue that the policy which they support is settled by authority than that it is the right one. We can thus rarely trace the mental processes that underlie the adoption by the courts of some social or economic principle. The origin of many of the most important phases of legal policy, by which legal systems are distinguished, is obscure; so in Rome the establishment of the free marriage, the recognition of the right to legal portions, and the pretorian system of inheritance; in England the system of primogeniture, the extreme measure of marital right, and the disappearance of wills of land. We do not know to what extent legal reasoning and argument were instrumental in securing the adoption of any of these policies, but it is safe to conjecture that where there was an innovation upon old-established institutions and principles, and the change took place through the administration of justice, it was brought about gradually and covertly, without an acknowledged overturning of the previously established law. Fiction and equity are the most familiar but not the only agencies that have accomplished silent revolutions in the law, and there is, perhaps, no period of legal history which presents more striking instances of the operation of these subtle and elusive forces of transformation than that of the English law in the two centuries following the Norman Conquest, as described to us in the classical treatise of Pollock and Maitland. Most of the important advances that have been made in the English law without the intervention of legislation in more recent times are associated with the rise and development of equitable jurisdiction,

<sup>1</sup> Proem to Second Part of *Institutes*.

just as in the middle period of the Roman law they are associated with the office of the pretor.

Admirers of the unwritten law point to its power to adapt itself to change of circumstances in time and place. It is quite true that both the Roman and the English law have shown themselves capable, on the whole, of keeping pace with the advance of civilization for centuries with remarkably slight aid from legislation. The study of these two systems reveals, however, also the shortcomings of this form of law and legal development.

In the first place, flexibility seems to decline with the advance of jurisprudence. Where the evidences of law are carefully collected, and decisions closely watched and scrutinized, the settled law is not easily unsettled; constant analysis is not congenial to the subtle processes of change to which reference has been made. So the Roman law, after having stripped the father of most of his substantial control over the son, was unable to shake off its theory of the paternal power; it retained the distinction between *quiritarian* and *bonitarian* ownership, between Roman and provincial soil, between civil and pretorian inheritance, between legacies and trusts, between wills and codicils, long after they had ceased to serve any practical use. The English law grew increasingly rigorous after the restoration of the monarchy. The protection of authors' and inventors' rights, the most important extension of the idea of property in modern times, had to come first from the sovereign prerogative, and then from the legislature; the common law courts were unable to extend the general principles of the law of torts into a right of action for death caused by a wrongful act, although the same difficulty was not felt on the continent of Europe; the right of privacy is still looking for general recognition; and the unqualified application of the English law of water-rights in many American jurisdictions did not evince great power of adaptation to changed circumstances.<sup>1</sup>

In the second place, a process of transformation which leaves the previously established law formally intact must result in complex and technical legal arrangements. This was very obvious in the Roman law, and is equally so at present in our own. The distinction between the civil and the pretorian law, as that between law and equity, bears witness to the loss of simplicity by which the substantial gain in justice had to be bought. It was one of the great achieve-

<sup>1</sup> Nineteen states apply the common law doctrine of non-tidal waters to non-tidal navigable rivers (Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Carolina, Vermont, Wisconsin). *Am. and Eng. Encyclop. of Law*, 1st ed., vol. 16, p. 253. Seven of the arid states of the West (Kansas, Nebraska, South Dakota, North Dakota, Texas, California, Washington) followed the common law of riparian rights instead of adopting the doctrine of prior appropriation. Farnham, *Water Rights*, secs. 649-651.



ments of Justinian that as an incidental and preliminary part of his codification he removed nearly all of this cumbersome and needless complexity; and it is safe to conjecture that the Roman law, with all the technicalities of its classical form, would not have been a fit subject for reception by the nations of Continental Europe. The common law has not yet undergone this process of simplification, and if it has likewise spread over a large portion of the civilized world, this has not been due to a peaceful conquest of foreign nations, but to the expansion of the English people, who carried with them the learning and the traditions of their legal profession.

The legal profession is not seriously inconvenienced by the technicalities of a legal system, and rather cherishes them as an intellectual possession in proportion to the labor and effort which it has cost to master their difficulties. It is also right in preferring technicality to a simplicity which would in reality mean vagueness and uncertainty. The tenacious adherence to established though cumbrous forms is to some extent justified by the great difficulty of piecemeal amendment of an intricate system and the risk of harm from bungling legislation.

Both in Rome and in England the appreciation of these difficulties led to almost absolute legislative inaction in the domain of private law for centuries. The history of the two systems shows that for long periods the sense of abstract justice in civil relations may lack sufficient force to induce any action on the part of the sovereign power of the state in the direction of improving the general law. The impulse to legislation effecting a decided progress in jurisprudence has almost invariably come from the pressure of special interests and has often been confined to their satisfaction.

There are, however, exceptions to this rule. There have been periods of legal history when improvement of the law was felt to be among the chief functions of sovereignty, and when legislators were as much impressed with their wisdom and their power of promoting justice as with the inadequacies of the unwritten law and its lack of capacity for unaided development. Such was the period of the later Roman Empire, especially that of Emperor Justinian; the latter part of the thirteenth century both in Spain and England; the sixteenth century in Germany; the period of the close of the eighteenth and the beginning of the nineteenth century in Germany and in France; again the latter half of the nineteenth century in Germany, and perhaps, although in a less pronounced manner, in England the period beginning with the reign of William IV. The causes that bring about such legislative activity — if any definite causes can be assigned — probably vary greatly in each case, and if the demand of a famous jurist had been heeded that before yielding to the impulse a state should establish its “vocation” by adequate

scientific work in jurisprudence,<sup>1</sup> nothing would probably have been accomplished in any age.

Each system has, on the whole, derived very substantial gain from these periods of active legislation. It is the orthodox view to see in the latest history of the Roman law a period of decline; but it is also true that some of the most enduring doctrines and principles of the civil law, — the benefit of inventory, the regulation of intestate distribution and of legal portions, the paternal usufruct, the principles of limitation and adverse possession, — have been the fruits of the latest imperial legislation. In England, the reign of Edward I came in the formative period of the law, but of the second great legislative reign, that of Queen Victoria, it is safe to say even at this time that the improvements it has brought about in the common law are greater than those of any other era of English legal history.

## II

While in removing technicalities and rules that have outlived their usefulness the legislative power merely remedies the defects and omissions of the unwritten law, the conscious and deliberate adoption of new policies is a function distinctly its own.

The question whether a proposed new policy is wise or unwise in its immediate or remote bearing upon social or economic interests is usually not regarded as a question of law, but of politics or statesmanship. Even the equity and fairness of the proposed policy is not generally understood as presenting a legal problem as long as the legislature deals with interests which are conceded to be subject to its power. But as soon as the interest becomes so vital as to assume the nature of a fundamental right, questions of justice become questions of law, and the principles of legislation fall within the province of jurisprudence.

We touch here one of the distinctive features of American legal science. In countries in which the legislative power is not subject to judicial control, the principles of justice which bind legislation are not argued before the courts as other questions of law, but are conclusively determined by the legislative organs of the government. Under the American system of judicially enforced constitutional limitations these principles have become the subject of professional argument, and are determined by the courts on the basis of reason and logic. It becomes, under these circumstances, a question of great interest whether this new departure of American jurisprudence has resulted in the discovery of new principles of private right, or has given greater practical security to those previously recognized.

<sup>1</sup> Savigny, on the *Vocation of our Age for Legislation and Jurisprudence*, 1814.

If the words of the Fourteenth Amendment are taken as the most concise expression of fundamental constitutional limitations, there are three main rights which all legislation must respect: liberty, property, and the equal protection of the laws.

Of these, the respect of vested rights is, and has always been, a principle recognized by all civilized governments, not merely as a rule of policy, but as a rule of law, in such manner that occasional violations, if not due to mere inadvertence, have been felt to be either sovereign acts of necessity, or despotic acts of wrong which the absence of a legal remedy did not convert into legal acts in any other than a purely formal sense.

What gain has then resulted from the judicial enforcement of this right against the expression of the legislative will?

We notice, in the first place, that constitutional clauses have not rendered impossible great extra-legal acts of revolutionary reform sweeping away vested rights of property; the abolition of slavery without compensation is conspicuous evidence of this, in marked contrast to the provision for indemnity by an omnipotent Parliament.<sup>1</sup> Where vested interests run counter to the moral sense of the community, they have found very inadequate protection in the constitutions. Upon the theory that the police power cannot be bargained away, the courts have sanctioned the legislative annulment of liquor licenses and lottery charters that had been paid for; they have refused to recognize an established business as a vested right where it affects the public health, and have allowed retroactive legislation to stand even where the public health was not affected, as in the oleomargarine legislation. In these cases the unvarying practice of European legislation is either to pay compensation or to avoid retrospective operation, and in this country as well as in Europe vested interests must rely upon the legislative sense of equity and good faith, in which, as a general rule, they are not disappointed.<sup>2</sup>

When we turn to the cases in which statutes have been declared unconstitutional as impairing vested rights, two categories are conspicuous. The one is where, through inadvertence, the legislature in instituting a reform failed to confine the operation of the new law to cases arising in the future. It is best illustrated by laws changing marital, dower, and homestead rights without exempting rights already vested from their operation. In these cases judicial control conferred an undoubted benefit; but the benefit is one which ordinary care in legislation renders superfluous. Moreover, expectant

<sup>1</sup> The repudiation of state debts may be left out of account, since claims against states were, by the Eleventh Amendment, deliberately withdrawn from judicial control.

<sup>2</sup> The writer begs leave to refer for fuller exposition and for citation of authorities upon the subject of vested rights as well as of the doctrines of liberty and equality, to his treatise on the *Police Power*, 1904, especially chapters 13, 19, 20, 23, 25, 31.

interests have been allowed to be cut off by such legislation because the courts considered that they did not amount to vested rights, and equities have thus been sacrificed which under more careful methods operating without constitutional limitations are always safeguarded.<sup>1</sup>

The second category consists of cases in which a strict conception of the inviolability of private property rendered impossible the carrying out of a policy intrinsically just and desirable. This may be illustrated by laws attempting to authorize the condemnation of land for private rights of way, or the creation of drainage districts for the improvement of land of several owners by the vote of a majority. In one jurisdiction the supposed sanctity of private property was held to make it impossible to provide for the commutation of perpetual ground-rents at the option of the landowner, a legislative policy common to other countries.<sup>2</sup> An American court quotes with approval the words of an eminent jurist: "The owner of one rood of land may stand in the way of any private enterprise, however much the general utility may be thereby hindered, and no human power in a free country where the principles of *Magna Charta* prevail in their full force can compel him to budge one step."<sup>3</sup> Under such exaggerated judicial views of private right it has, in a number of instances, been necessary to obtain a change in the constitution in order to carry out a legitimate legislative policy, and in the matter of corporate privileges and exemptions the Supreme Court of the United States has found it advisable to modify more and more the view of the contractual obligation of the charter which in the beginning it proclaimed in too unqualified terms.

Judging from past experience, then, the net gain resulting to American jurisprudence from the judicial enforcement of vested rights is slight; and if it should be urged that we must take into account the vicious legislation that the expectation of judicial control has forestalled, the answer must be that if this effect could be proved, it would not constitute a net gain, but simply the prevention of a loss due to defects from which other systems appear to be free.

The two other rights named in the Fourteenth Amendment are the right of individual liberty and the right to the equal protection of the laws. In a constantly growing number of cases the right of individual liberty is being interpreted to mean a right to contract free from legislative restraint, while the equal protection of the laws is held to prohibit legislation singling out a class though not otherwise violating its fundamental rights. Upon one or the other of

<sup>1</sup> Compare *Westervelt v. Gregg*, 12 N. Y. 202, with *McNeer v. McNeer*, 142 Ill. 388.

<sup>2</sup> *Palairot's Appeal*, 67 Pa. St. 479.

<sup>3</sup> *New England Trout, etc., Club v. Mather*, 68 Vt. 338. The words are Judge Redfield's.



these two principles, or upon both, a considerable mass of economic and social legislation has been declared unconstitutional.

While, as has been before observed, the respect of vested rights is an universal principle of law controlling every system of jurisprudence, this is not true of the two principles last named. Both the civil and the common law rest upon freedom of contract, and the systems of legislation based upon them recognize this freedom as a fundamental rule of policy. As a policy, however, it is subject to legislative control and not, like a rule of law, binding upon the legislature. In modern systems of law equality holds exactly the same place.

Has American jurisprudence changed these rules of policy into binding rules of law? and if so are they proclaimed as fundamental rules of justice or merely as principles demanded by, because conformable to, the American type of government and of society?

Decisions have undoubtedly been rendered in considerable number, declaring unconstitutional, as violating the rights of liberty or of equality, or both, certain statutes of a social or an economic character; some, perhaps the majority of them, dealing with the employment of labor, others with a great variety of other forms of business, and the courts have been emphatic in asserting that the constitutions guarantee a certain sphere of freedom of contract and of business and prohibit unwarranted discrimination.

But does such assertion amount to the laying down of a positive principle? What does it mean, to say that the fundamental law secures a certain amount of liberty, if it is not said how much, or that it forbids unjust discrimination, if the injustice is not defined? It is the merest commonplace that some restraint of liberty of contract and business, some discrimination, is not merely valid, but essential to the interests of society. Can the fundamental law be satisfied with the proclamation of rights of absolutely indeterminate content, directly contrary to other recognized principles, or is not limitation and definition of some sort absolutely essential to an intelligible rule of law? The courts have given us criticism, denunciation, and condemnation, but no positive guidance. The course of adjudication is marked by divided jurisdictions and divided courts, resulting in a lamentable uncertainty as to the limits of legislative power.

### III

Yet the position taken by the courts is not merely acquiesced in, but regarded as indispensable, and, on the whole, beneficent. For this judicial censorship is not only justified, but made necessary, by prevailing legislative conditions. It would be untrue to say that



all of the legislation that has been declared unconstitutional has been vicious or oppressive, and none of it has been absolutely arbitrary or unreasonable; but most of it has been of doubtful wisdom or expediency, and probably all of it had inflicted or threatened to inflict serious injury on legitimate interests. And it is probably true that, in the great majority of cases, those interests received their first hearing under forms giving some assurance of impartial and adequate consideration in the courts of justice. The explanation, although not the juristic theory, of this phase of judicial control, is that a corrective is needed against methods of legislation affording no guaranty of justice.

These methods — if we should not rather speak of lack of methods — are perhaps the natural result of leaving the entire work of legislation to a large body constituted primarily for purposes of policy and not of justice. Parliamentary legislation in England until recent times was marked by the faults which we have inherited: spasmodic and unrelated measures not uncommonly induced by some striking case revealing the injustice or defect of the existing law, or by the pressure of special interests; no definite responsibility for the introduction of bills; no thorough preliminary investigation of the conditions to be remedied; no adequate public discussion of the terms of a proposed measure; and involved if not faulty phraseology of statutes. In England these conditions have been practically superseded, because none but government measures have any chance of passing and because the government is at present aided by the honest labors of parliamentary commissions of inquiry and by the skill and experience of expert draftsmen.<sup>1</sup> In most of the American states the defects that have been pointed out continue practically unchanged; in others the improvement has been only slight.

The natural consequence of the faults described has been a marked inferiority of statutory legislation, and, owing to this, a peculiar attitude of impatience and disrespect toward it on the part of the courts and of the profession, so that it is almost regarded as a disturbing factor in the otherwise well-coördinated structure of the common law. If in this country we are slow in remedying this condition of things, it is partly because of the intrinsic difficulty of reform and of the technical nature of the evils to be cured; partly because in former times other and more pressing problems concerning legislation engrossed the public attention. The use of the legislative machinery for partisan political purposes, and the necessity of legislative action for the grant of franchises, added fraud and cor-

<sup>1</sup> On the history and present methods of drafting statutes in England, see Frederick Clifford, *History of Private Bill Legislation*, 2 vols., London, 1885-87; and Sir Courtenay Ilbert, *Legislative Methods and Forms*, Oxford, 1901.

ruption to inefficiency and carelessness, and led to the manifold restraints on legislative powers and methods which are characteristic of the constitutions and constitutional amendments of the second half of the nineteenth century. The various improvements in methods of legislation had for their object to advise legislators of the purpose and content of measures, and to make more difficult the adoption of bills without any consideration in the closing days of the sessions; none sought to secure responsibility for initiation, notice, and hearing to the interests affected (except, in some states, in case of local legislation) or the requisite legal skill in the drafting of acts; for the defects concerning these points did not sufficiently impress the public mind, and the legal profession did not seem to feel that its interests required their removal.

Nearly every one of our constitutional provisions owes its existence to concrete and definite experiences of either the American or the English people in the matter of government. It is well known that the Fourteenth Amendment was enacted to deal with the specific problem of the protection of the Negro. When the due process clauses in the earlier constitutions were formulated, the interference of the police power with economic interests had not aroused any noticeable discussion or protest. Historically it is indisputable that these fundamental clauses were not designed to impose upon the American system of government hard and fast doctrines of economic liberty as principles of constitutional law.

But when with the increasing complexity of the social and industrial structure of the state the functions of government began to expand, when a demand arose for the satisfaction of novel conceptions of public welfare, and the interests of the economically weaker classes came to be identified with the public interest, it was inevitable that those who were prejudicially affected by this extension of state power should refuse to regard the frequently crude enactments of a discredited legislative department as final and conclusive. The traditional judicial attitude toward legislation, coupled with the firmly established power of controlling the validity of statutes, made it equally inevitable that the courts should entertain appeals to this power, and that they should seize upon the fundamental guaranties of the constitution as forbidding legislation which injured valuable interests without any assurance of careful consideration, where such legislation seemed to them needless or oppressive or contrary to earlier American conceptions of the sphere of government. Hence, the long array of decisions which within the last generation has thrown the law of the police power into confusion and uncertainty.

There are a number of undeniable objections to this method of correcting evils of legislation by judicial action: In the first place,

the judicial methods of reëxamining the justice of legislation are in their turn far from satisfactory. It is true that the two adverse interests are represented by counsel, and the courts are supposed to decide according to the preponderance of evidence and of reasoning; but the facts are not like those in an ordinary lawsuit, since they cover a wide range of social and economic phenomena and experiences, for the ascertainment and estimate of which the machinery of the courts is quite unsuited; the arguments employed by the courts for condemning a policy are in many cases hardly less crude than those that may have moved the legislature in adopting it.

In the second place, judicial relief places the courts in an attitude of antagonism to the legislature which under any system of government, but especially in a democracy, is unfortunate. The courts in enforcing theories of economic liberty and equality after all pass upon questions of policy and not upon questions of law. This function finds no precedent in other countries and it is novel even in this; it remains to be seen whether the courts can long continue to exercise it without suffering in reputation for impartiality, and thereby in popular confidence.

Finally, the exercise of judicial control is not prompt or certain. It is left entirely to private initiative to attack unconstitutional legislation. While ordinarily the interests of the parties adversely affected by the legislation will lead to timely action, instances are not wanting where years and even decades passed before a statute was declared unconstitutional. It is obvious that, for example, in the matter of the validity of acts authorizing municipal bond issues, every consideration of justice and good faith requires that the constitutionality of an enabling act should be settled before and not after the bonds are issued.

Notwithstanding these objections, the principle of judicial control of legislation is so firmly intrenched in our whole constitutional system that it is not apt to be dislodged, nor does it show any signs of weakening. There are even some tendencies apparently running counter to it that will ultimately work in its favor. It has repeatedly happened that a decision denying the exercise of some judicial power was followed by a constitutional amendment granting the power denied.<sup>1</sup> In extreme cases these enabling clauses will themselves be invalid under the Fourteenth Amendment, but even as valid grants of power they are as to scope and content subject to the interpretation of the courts. A number of large and positive policies defined in the constitutions will be preferable to the wholly

<sup>1</sup> Eight-hour law for miners; *Re Morgan*, 26 Colo. 415; constitutional amendment, 1902. Indeterminate sentence law; *People v. Cummings*, 88 Mich. 249; constitutional amendment, 1902. Conditions of employment by public contractors, *People v. Coler*, 166 N. Y. 1; constitutional amendment, 1905.

vague restrictive and negative principle of liberty and equality. Under a considerable number of such enabling clauses our system would somewhat resemble those parts of the European public law in which the legislature contents itself with indicating in large outline the principle of state control, leaving the administration to adopt measures within that principle. This allows a strong judicial control of governmental action, combining permanency of principle with flexibility of detail. The parallel becomes closer when we consider that it is easier to procure a constitutional amendment in some of our states than an important change of legislative policy in the great European countries.

The continued exercise of judicial control will, to a certain extent, carry its own remedy. True, one of its effects has been, and will continue to be, to weaken the sense of constitutional restraint on the part of the legislature, which will give itself the benefit of the doubt where the question of validity is controverted, and hold itself relieved from moral responsibility if a measure is sanctioned by the courts. But, on the other hand, where the legislature is sincerely anxious to carry into effect some policy, the expectation of judicial control will induce it to be scrupulous about observing constitutional limitations.

Exhaustive inquiry into the conditions to be regulated, impartial consideration of all interests concerned, and skilled and careful draftsmanship are equally indispensable requirements to produce legislation that is to avoid both inefficiency and injustice. In England, France, and Germany the observance of these conditions is made possible by the fact that the respective governments introduce all important bills, that they have the greatest facilities for ascertaining the facts underlying the proposed measure, and that they command the services of highly-qualified officials acting as draftsmen. These conditions cannot be easily reproduced in a country in which the government has no initiative in legislation, and in which it is often very difficult to place the responsibility for the framing and the introduction of a measure. In recent years a few states have made provision for officials who are to aid in the drafting of bills,<sup>1</sup> and for the systematic collection of information regarding legislation and legislative problems,<sup>2</sup> and a great deal of valuable statistical work is done by official bureaus in the states and in Washington. It is to be hoped that these efforts in the direction of improving

<sup>1</sup> Laws of New York, 1901, ch. 88. Connecticut General Statutes, 1902, sec. 37. See *New York State Library Review of Legislation*, 1903, 2-4. South Carolina Code, 1902, sec. 21.

<sup>2</sup> *New York State Library Year-Book of Legislation*. Legislative Reference Department of the Wisconsin Free Library Commission. See *Review of Reviews*, December, 1905.



and harmonizing methods of legislation will, in the near future, be further extended and especially that they will receive the active support of legislative bodies.

#### IV

For the purposes of the relation between jurisprudence and legislation statutes may be divided into two great groups, those which deal with ordinary civil relations (rights of property, transfer, contract, debt, agency, suretyship, wills and estates of decedents, etc.) or with questions of procedure and practice, and those which fall mainly under the general heads of administration, police, and revenue.

In the framing of statutes of the first group, purely legal considerations have generally been controlling, and, on the whole, that legislation has been in substance as well as in form the work of professional jurists.

In the framing of measures of the second group, on the other hand, the attention of law-makers is centered on political, social, and economic interests, and desired improvements call above all for a careful, intelligent, and impartial consideration of facts not primarily legal. The wisdom and justice of this legislation is a question of economics or politics, or of the technicalities of trade and industry, and not of jurisprudence, and if our courts could be assured that the statutes brought before them embodied the matured conclusions of those departments of learning and thought, they would probably be less inclined to make the economic and social justification of a measure a question of constitutional law. Neither the determination of the sphere of economic liberty nor the propriety of classification for legislative purposes belongs, properly speaking, to the province of jurisprudence.

The following are, on the other hand, questions of law which enter into nearly every piece of social and economic legislation: the respect for vested rights; the avoidance of retroactive operation, together with the legitimate and valid exceptions from this principle; the extent of permissible delegation of the details of measures to administrative authorities, and the power to relieve from the operation of a measure in particular cases; to what extent powers of obtaining information and powers of enforcement should be granted and which of these powers should be withheld, with a view on the one hand to securing compliance and preventing evasion, on the other to avoiding injury to legitimate interests and obviating a misuse of official powers; the question whether the process of enforcement shall go through the courts, and whether it is safe and permissible to provide for summary administrative powers; the question what civil



rights of action should be granted both on behalf of the government and on behalf of the individual.

Under our system of constitutional limitations nearly all these questions have become judicially cognizable as bearing on the validity of statutes, and a considerable amount of legal literature has grown up in which the principles in question are discussed. In England legal treatises discuss only questions of statutory construction, because only these can come before the courts, and although Parliament acknowledges limitations of a constitutional character, these are not considered in law-books because they are not judicially enforceable. This is characteristic as showing that legal literature and therefore legal science, appealing as it does exclusively to the legal profession, confines itself to producing material which is available primarily for the administration of justice and only incidentally for legislation. The instructive material which law-books contain for legislative purposes is rarely formulated in such a way that the lesson which it points is plainly put as a rule of statutory draftsmanship; and errors are, therefore, of constant occurrence which the most elementary law-book for the drafting of statutes ought to guard against.

Legal science ought, however, to do a great deal more for legislation than present material already digested in a more convenient form.

Our legal literature is deficient in two branches of information which the courts use only occasionally, but which are of infinite importance to the legislator: the history of statutory legislation, and the history of the operation of statutes, showing what success or failure a given piece of legislation has met with in its practical application.

The history of legislation should show two things: In the first place, the changes through which a statute has gone, both in its original course through the legislature and in its subsequent amendments, the statutory or common law which it superseded, and earlier statutes dealing with the same problem; in the second place the motives or reasons which brought about each particular provision, both in the legislature and out of it.

The formal history of statutes is matter of record, and for a few branches of legislation the material has been brought together; there are many other branches in which very little, if anything, has been done. If we compare the degree of perfection with which judicial decisions have been digested, the contrast is striking. The need for a similar digesting of statutory legislation is public rather than professional, and it is not to be expected that the work will be systematically undertaken through the regular channels of professional publication.

The other part of the history of legislation will, to a great extent, be always unknown. For the vast majority of the acts on the statute-books of our states, the reasons or considerations inducing their adoption have not been formulated. There has often been no discussion in the legislature whatever, or if there has been, only incomplete accounts of the debates have been preserved in the daily press. It is otherwise with regard to the more important legislation of Congress and, in a number of states, with regard to the enactment of constitutions. In some branches of administrative legislation there are comments and recommendations of official authorities, and revisers' notes furnish for a few states valuable material. The whole amount of this source material is poor as compared with what the official publications of England, France, and Germany afford. A great amount of information for legislative history is scattered through the law reports, in cases construing statutes and pointing out defects, which led to appropriate amendments. But the current digests pay no particular attention to this feature of the law reports, and the information is therefore not in a readily available form and has not to any considerable extent been utilized.

As for the history of operation of statutes, there has never been any systematic observation of the working of the laws of persons, property, or contracts. Excepting the subjects of bankruptcy, divorce, and to some extent of personal injuries, there are no civil judicial statistics, still less, of course, any information regarding the legal relations that do not reach the courts. In codifying the German civil code, use was made of data collected by the government regarding the prevalence of certain forms of marital contracts and testamentary dispositions; nothing of this kind would be available in the United States. The Census Bureau in Washington would be the only organization in this country to gather information of this kind, and there is no present prospect of its undertaking so far-reaching and difficult a work. Nor is there any near prospect that our states will undertake the collection of judicial statistics. General impressions instead of exact and systematic observations will, for a long time to come, be the basis upon which the policy of our civil legislation will be built, and there is no promise of any radical advance of jurisprudence in this respect.

With regard to revenue and police legislation, however, the outlook is much more hopeful. A considerable amount of information is even now available in the official reports of the authorities charged with the administration of the various acts, which naturally deal to a considerable extent with the administrative and judicial aspects of legislation. With the multiplication of controlling and regulating boards, more and more light will be thrown upon the operation of principles of constitutional and administrative law.

All this material ought to be collated and digested in the same manner as is now done with judicial decisions, and the result should be the construction of a body of principles of legislation to supplement the existing body of principles of law. Both in its material and in its method this branch of legal science must differ considerably from the judicial jurisprudence with which we are most familiar; but it is a department of our science equally legitimate and valuable, and destined to grow in importance with the increasing legislative activity of the modern state.

## THE DOCTRINE OF STARE DECISIS

BY EDWARD B. WHITNEY

[Edward B. Whitney, Lawyer, New York. b. New Haven, Connecticut, August 16, 1857. A.B. Yale University, 1878. Assistant Attorney-General of the United States, 1893-97. Author of many contributions to reviews; and has addressed associations on legal and particularly constitutional questions.]

I AM requested to present a paper whose theme is suggested by the Present Problems of Private Law, as distinguished from law that has a constitutional or international aspect. I doubt whether there is any other section of the Congress whose themes are so difficult to select. We cover, indeed, those branches that mainly concern the ordinary, plain, steady-going, stay-at-home, law-abiding citizen, — that multitude of questions among which most legal practitioners everywhere are wearing out their lives, working every day and all day upon Present Problems of Private Law. Each of those problems interests the parties to the particular litigation or negotiation or dispute or difficulty which brings it up. Some interest even the lawyers to whom they are presented. Few interest anybody else; and even among these few but a small minority possess such world-wide interest that they are worthy of the consideration of a Congress representing all the civilized nations of the globe.

Furthermore, this is not an International Congress of Lawyers. There is such a Congress; but it is a different one, and does not meet until next week. This is a Congress of Arts and Science; and of all the Present Problems of Private Law none is so difficult as to give to any portion of private law, as known at least to the American practitioner, the semblance either of a science or of an art.

Science, as I understand it, is a search after absolute truth,<sup>1</sup> — after something which when once ascertained is of equal interest to all thinkers of all nations. No matter how wise and learned and famous a person may have said that a thing is so in the realm of science, it remains open to anybody to prove that it is not so; and if it is proved to be not so, the authority of the wise and learned and famous person disappears like a morning mist. In science, what we are really seeking is not the opinion or the command of any human being. We are subject to no command, and are not bound to follow any previously expressed opinion. But when a lawyer is trying to find out what is the law upon any particular point, in order to advise his client, he first inquires whether a collection of men exercising legislative functions and having jurisdiction in the premises have commanded anything upon the subject; and if they have, he has nothing to do but to interpret, if he can, the usually vague and unscientific

language in which their command has been couched. If he cannot find any such command among the books of statutes and ordinances — in other words, if the subject has not been legislated upon — then usually under present conditions the American lawyer's task is not to ascertain by what rules human beings should be governed in the absence of legislation, but by what rules certain persons of authority have in the past said that they should be governed; the authority of these persons not arising from any transcendent wisdom or learning of their own, but mainly from the fact that they had been theretofore elected or appointed to a certain public office.

Nor is it easy to consider any theme suggested by Present Problems of Private Law in the light of an art. The presentation of any given case to a judicial tribunal involves the knowledge and application of art as well as of science. If literature and rhetoric are arts, and psychology is a science, there is high art in presenting the facts of the case and the true application of the law thereto, in such a blaze of light that they will remain indelible in memory. There is still higher art in so presenting them that something other than the truth may thus reach the judicial mind; for in the practice of the law the highest degree of artistic skill is to conceal the truth, not to exhibit it. But in the body of the law itself, as known in America at least, as it is developed out of the work of legislative committees or litigating counsel and is verified by the signature of governors or presidents, or enunciated by judges, the artistic element is rarely to be found.

Among the problems common to the whole world which have been bequeathed to us by forces peculiar to the century just closed, probably those will first come to mind which are the result of economic progress; changes desirable in the law of corporations, in the law regulating the relations of capital and labor, and in the law of transportation. These, however, belong more to the realm of sociology and political economy than to that of law. We can advise the experts of those sections as to what the old law is, what changes can be made in any given state or country without violating its particular constitution, how its constitution can be changed if a change be desirable, and in what verbiage the desired changes should be couched, so that they may be effective; but as to what the substance of the changes should be, this section of the Congress is not the one most appropriate for a discussion.

Other problems arise from the close communion into which the various peoples of the earth have been brought by the quickening and cheapening of transportation, mixing them together by intermigration, by intermarriage, by foreign stockholdership, bondholdership, and other property ownership, and in so many other ways. But these problems, as practical problems of the present generation.



belong rather to the section of Private International Law than to ours.

I believe, however, that there is one problem brought daily to the attention of the practicing American lawyer, which, while of ancient origin, is now fast coming to the acute stage, and to the verge of radical treatment, which belongs peculiarly to the law itself, without any adverse claim on behalf of the professors of ethics or sociology or political science. I refer to the problem as to how the law itself should be authoritatively declared and evidenced.

It is a familiar fact that in every English-speaking community the body of the law is divided into two portions: first, the so-called judge-made law, which is to be found in records and reports of the decisions and sayings of judicial officers; and second, the statute law, which consists of enactments by parliaments, congresses, or legislatures, together with executive regulations and municipal ordinances adopted under powers lawfully delegated by legislative authority. According to the theory of English jurisprudence, the so-called judge-made law was not made by the judges at all, but existed, although not written, as the ancient and general custom of the English-speaking people, and in the shape of ethical rules which they had tacitly recognized and adopted; but the authoritative evidence of such a custom was the decision of a court, and by the doctrine of *stare decisis* such a decision when once made became conclusive evidence, — conclusive within the territorial jurisdiction of the court until overruled by some higher tribunal, — conclusively establishing the existence of some rule which thereafter could not be changed except by legislative enactment.

This judge-made law has been called by its admirers the perfection of human reason; and theoretically there is no other method equally efficacious of finding out what is the true rule of law applicable to any given state of things. It may be well to analyze the theory of judge-made law and recall to mind the reason why it is theoretically superior to the work of the wisest legal philosopher, in order that we may realize more clearly why the theory is becoming less and less justified by the practical results, and why, as a result to some extent of the rapid growth of the English-speaking world in the nineteenth century and of the rapidly increasing complexity of our civilization, and to some extent of mere lapse of time, it is weakening and showing signs of an early breakdown unless at least some radical remedy is adopted.

The theory of judge-made law, the theory underlying the system by which the decision of a court in a litigated case becomes the highest evidence and conclusive evidence of the existence of a previously unwritten rule of law, involves in the first place the assumption that the case is a genuine controversy, involving two or more

parties litigant, each determined to use every effort to win. It involves the assumption that each of these parties litigant is represented by counsel learned in the law, skilled in its exposition, and having, through compensation, or the hope of it, or charity, or that love of a fight which is inherent in the human race, sufficient interest in the outcome of the litigation to call forth their best efforts. It involves the assumption that these counsel have familiarized themselves with the statutes, the judicial precedents, and the general principles of law, public policy, and ethics which are applicable to the controversy, and that each has reduced his view of the case to clear and logical form. It involves the assumption that they come before an able, experienced, and impartial judge or bench of judges. It involves the assumption that each judge listens to each side until the case has received all of the oral argument which it properly requires, elucidating by questions any matter that may have been left obscure or in ellipsis by counsel. It involves the assumption that each judge is already familiar with the previous statutes and judicial precedents that are applicable to the case, or else that during the course of the argument, or by subsequent examination of the books, he familiarizes himself therewith. When these assumptions are all warranted by the actual facts, it is evident that after counsel have exhausted all possible effort to present the various points of view, and the judge has supplemented their work by means of his own experience and independent research, and especially if he be sitting in the highest appellate tribunal, with the benefit of the repeated reëxamination and sifting of argument in the courts below, and of the light inevitably thrown upon a litigation which has been pending during a long series of years by reasonings and analogies such as are sure to come from time to time to the attention of counsel whose minds have become impregnated with the case, or to be contributed as fresh minds take it up upon the substitution of one counsel for another, then the judge is better equipped to declare the correct application of established principles to the particular case before him, and better equipped to apply general reasonings and analogies to a case of new impression, than can be any closet student. The different method and the different point of view of the legal text-writer or philosopher are indeed invaluable in contributing to the elucidation of unsettled problems; but, from the necessary limitations of the human mind, no legal reasoning can be regarded as having passed the final test until it has been subjected to the practical analysis of an actual litigation.

The judge having thus made his decision, he very commonly states orally or in the form of a written opinion his reasons therefor. It is assumed that if this decision is preserved at all, and is brought up for future use as a precedent, the facts before the court and the

process of reasoning by which the result was reached are accurately known. It is assumed either that they are accurately reported in some book or periodical, or that they have been completely incorporated in the record of the case. The precise point decided by the judge is thereafter in theory recognized as a part of the general body of the law of the state, colony, or nation whose judicial officer he is. Theoretically it remains conclusive evidence until overruled or repealed, or unless it is found to be in conflict with another decision of equal authority, in which case, with the benefit of all the work done in the two litigations represented by the conflicting decisions, the question is submitted to a further and final test whenever it may again arise. The reasoning in the opinion of the court is not conclusive evidence of the law except so far as it is necessary to the precise point decided, because so far as it is not thus necessary the judge is not presumed to have had the full benefit of the research and arguments of counsel, or to have given to his own reasoning and use of language the same degree of attention. His unnecessary reasoning, therefore, receives in the English law and American courts the same weight only which is awarded to all judicial decisions in other systems of law if I correctly understand them; namely, that which belongs to the opinion of an able and learned professor or textwriter, which is to be considered with care and respect, but not necessarily to be followed. Hence, the so-called syllabus or abstract prefixed to every modern printed report of a judicial decision when properly drawn up is very often composed of two parts: first, a statement of the precise point decided, with so much of the facts and reasoning, and so much only, as is necessary to make clear that decision; and second, propositions laid down, as we say, *obiter*, which might have been omitted without creating an ellipsis in the train of argument by which the actual result of the case was reached.

This is the theory which causes the English or American lawyer to give greater weight to an appellate decision delivered by Lord Mansfield after argument by such counsel as Dunning and Law, to one delivered by John Marshall after argument by Webster and Wheaton or Pinkney, than to the work of any philosopher; why he would give comparatively little weight to any reasoning of Mansfield or Marshall himself in a case that went by default, or where the reasoning was unnecessary to the decision; and why he has grown up and lives with the belief that his Continental brother is deprived of the most valuable instrument for the attainment of perfection.

It is evident that there was always some danger of defective application of the theory of judge-made law to the circumstances of the particular case; a little danger of the submission of a collusive

controversy, and a serious danger that the counsel might be incompetent or careless, the judge mediocre or wanting experience, the argument or submission of the case insufficient, the court's opinion obscurely or defectively expressed, the decision inaccurately reported. There was also the danger arising from the proverbial fact that hard cases make bad law, so that a doctrine occasionally becomes established because it did equity between the parties whose dispute first suggested its consideration, although in nine cases out of ten thereafter its application may be practically oppressive as well as theoretically indefensible. During some generations of lawyers and judges, however, the practical results approached the theoretical standard to a degree which could hardly perhaps have been expected, so nearly that the theoretical perfection of "case law" was almost a fetich with the legal profession, and that an overwhelming majority of the profession is still determinedly opposed to any change.

Yet I believe not only that the doctrine of *stare decisis*, unless some entirely novel and radical legislation can be devised to save it, must disappear through the inevitable course of human progress — and progress does not always lead from a worse to a better system — but that its hold, in the more crowded federal and state courts at least, has already to a considerable extent been weakened. It is increasingly common to hear active and successful practitioners in those tribunals say that they find less attention given now to precedent than formerly; that when a litigation comes before a court of last resort which perceives or thinks that it perceives the right to be on one side, they find an increasing tendency to disregard, or to distinguish upon some trivial ground, any precedent to the contrary; that they find less and less discrimination between general statements of law contained in a former judicial opinion and the actual point that was decided; in other words, between what may have been *obiter* in the opinion and what was really settled thereby; that they find increasing weight attributed to general statements of the law in text-books and encyclopedias, even in works fresh from the press, photographs of whose authors, were they exhibited to the court, might suggest the very recent law school graduate. These things are generally spoken of among lawyers by way of complaint, as if we were living in a temporary era of carelessness, due to an overcrowding of the court calendars, or to an imperfect manner of selecting the judges, or to a slovenly habit of presenting cases to the court, which should and will be corrected in the future. I think, however, that the change is not temporary but permanent; that it is the effect of forces which are permanent and beyond human control; that while these forces may not be very appreciably operative as yet in certain states, they are beginning to modify conditions everywhere, and in the larger states are modify-



ing them with a rapidity that will soon receive universal recognition.

A change very commonly noticed is that caused by the enormous multiplication of printed reports. At the beginning of the nineteenth century but an armful of judicial reports had been printed in the English language outside of England itself. For a long time subsequent, the cases of authority upon any given point were still so few that court and counsel could thoroughly familiarize themselves with every one of them, while a really considerable proportion of the law likely to come up in court was embodied in cases whose names were commonly known to all members of the profession with any pretensions to learning. About a hundred years ago each of the states of the Union then admitted had begun to produce a series of reports of at least the decisions of its highest court. During the nineteenth century the number of states of the American Union increased from sixteen to forty-five. Reports were also being issued in the territories and in a large number of the British colonies. Some of the individual states of the Union, moreover, as well as England and the United States, were producing reports of their inferior tribunals.

It is, indeed, not necessary for the practitioner, in order to ascertain all the law which is theoretically binding upon his client, to examine any reports outside of those of his own jurisdiction; but it is unsafe for him to stop there unless the statutes or reports in his own jurisdiction are absolutely in point and controlling. Even in England American precedents are continually cited and discussed; and in most of the United States, decisions of England and of other states, as well as those of the federal courts, are given great weight, while those of the British North American provinces are not entirely neglected. In the larger states like New York, as in England, the use of reports outside the jurisdiction is less common; but that is only on account of the enormous multiplication of reported decisions within the jurisdiction, so that to master the home decisions alone upon any given point is a harder task than it was to master all decisions at the time when the glory of judge-made law was at its zenith. Twenty-five years ago it was not unusual for the New York lawyer to keep in his library not only a substantially complete set of the reports of his own state and of the federal courts, but also a large selection from those of England as well as of some of the other American states. The private law library since then has been rapidly contracting in scope, while not diminishing in size. Even the largest offices are driven more and more to depend upon the great public or association libraries for the complete preparation of their work, which means a decrease of efficiency where the libraries are within the lawyer's reach, and



a greater decrease of efficiency where they are not. Even the keeping up of a set of reports of the various courts of a large state and of the United States is becoming an expense to be seriously considered in a city, not only in the original cost of the books but in the matter of office rent. Convenient for comparison is the year 1880, when the *Federal Reporter*, the present compilation of current decisions of the inferior federal courts, began. At that time, less than twenty-five years ago, the decisions of the United States Supreme Court could all be purchased in 64 volumes, and the decisions of the lower federal courts up to the same date, both reported and unreported, have since been collected in a series of 30 volumes. But the decisions of the United States Supreme Court since that date fill 94 volumes, while volume 131 of the *Federal Reporter* is already well under way. The regular series of reports of the appellate tribunals of New York State and of the old chancery courts prior to the same date were contained in 368 volumes, while since then 272 additional volumes have been already issued. In 1880 the regular series of the federal and New York state decisions required only seventy-three feet of shelf-room. Now they already fill ninety-five feet additional; and this is exclusive of the various series of unofficial reports of decisions, which partly duplicate and partly supplement the series above referred to, and of the various collections made up mainly of the decisions of the courts of first instance, of the cases elsewhere unreported or reported in abbreviated form, and of annotated cases, such as Howard's series in 69 volumes, Abbott's series in 66 volumes, the New York State Reporter in 123 volumes and still continuing, and the so-called Miscellaneous Reports in 43 volumes, a series commencing within the past twelve years and still continuing, this last series being of an official character and inflicted upon us by the state itself. All of these, and others which I have not named, must be continually consulted, and the lawyer is also being confronted continually with decisions cited from daily, weekly, or monthly periodicals, and occasionally with certified copies of opinions altogether unreported. The president of the American Bar Association in 1902, in his annual address to the association, stated that the law reports of the then past year contained 262,000 pages, and estimated that a man by reading 100 pages a day might go through them in eight years; by which time there would be new reports on hand sufficient to occupy him for fifty-six years more. A single tribunal recently established in the state of New York, and sitting in four different sections, the so-called Appellate Division of the Supreme Court, which held its first session in the month of January, 1896, has already published 95 volumes of officially reported decisions, besides writing a large number of opinions which are to be found in un-

official reports; and, as it is the highest tribunal in the state after the Court of Appeals, no lawyer pretending to any degree of efficiency in his office organization can afford to be without them. At the rate of progress which was kept up during the past year, volume 500 of these reports will be reached in the year 1941. By that year at latest the lawyer will see volume 329 of the present series of reports of the highest court of New York, volume 381 of those of the Supreme Court of the United States, and volume 431 of the reports of the lower federal courts; and other states will go the same way, in varying degree. When that day shall come, will human wealth and human patience be able to bear the burden longer?

Up to the present time the natural effects of this tropical torrent have been mitigated by the increased efficiency of the digester, but his work also is now voluminous. An annual digest of English and American decisions is now published. Those of the last year occupy, though in the briefest abstract, nearly 5000 double column pages.

The first obvious consequence of this unintermittent flow of reported opinions is that to handle a case properly, according to the ideas of the people who established the fame of judge-made law, requires each year a greater amount of time than it required before. Every additional opinion that bears or may possibly bear upon the case at bar must be read; and to read it involves the expenditure of an appreciable amount of time. The argument and decision of any still unsettled question, or question claimed to be unsettled, thus involves an enormously greater expenditure of time at four different points — in the preliminary preparation by counsel, in the oral argument, in the court's subsequent examination of the previous authorities preliminary to the decision, and in their discussion (when, as often, they are discussed) in the opinion which is subsequently formulated, so as to serve as future evidence of the law.

Now, on the contrary, instead of expending more time, all parties expend less. The preliminary examination of the authorities, when the case is in the hands of leading and distinguished counsel, cannot be done by them personally. If they had to do it, they could no longer accept enough business to support their families. As a general rule, even in cases of great pecuniary importance, they can carefully examine only a small proportion of the authorities, and must rely upon information derived from their law clerks or junior counsel in selecting what to read. In other cases they may not be able to read any authorities at all, nor to do any independent thinking, but take reason and precedent alike at second hand from others.

At the stage of oral argument, the old custom of allowing all the time necessary for the proper elucidation of the particular case in hand has become obsolete. It has been supplanted by rules putting an arbitrary time-limit upon argument, irrespective of the case; and while it is in the discretion of the court to extend the time, this is ordinarily done only in cases of the greatest immediate importance, although the others may turn out to be the cases of the greatest ultimate importance in determining the future course of development of the law. The highest courts indeed, like the Supreme Court of the United States and the Court of Appeals of the State of New York, allow sufficient time to cover ordinarily a sufficient statement of the facts of the case and, if it be a comparatively simple one, a fairly satisfactory outline of the arguments; but it is so impossible any longer within any practicable time-limit to discuss the authorities as they used to be discussed within the professional experience of men still living, that except under exceptional circumstances experienced lawyers do not discuss authorities at all, but submit them to the court in printed briefs. Moreover, even in the court last mentioned, the present liberal time-limit applies only to one class of appeals. Other appeals, including probably the majority of those which will be important in the future, are given a hearing so short as to be commonly inadequate to all purposes. In the lower appellate courts the nominal time-limit is apt to be still shorter, while in actual practice some courts feel forced to discourage all oral argument whatever and practically deprive themselves of the benefit of the opportunity, so important to the true understanding and solution of a difficult enigma, of extending cross-questioning of counsel by the court.

Nor does time permit that standard of care in the subsequent examination of the case which used to be considered a prerequisite. Nothing approaching the same care can now be given. During the last year of the chief justiceship of John Marshall, the United States Supreme Court, consisting then of seven justices, filed 39 written opinions. During the year 1903-1904 the same court, with nine justices, filed 212 written opinions, besides disposing of 208 cases without opinion. During the same year the New York Court of Appeals filed 221 opinions and disposed of 419 cases without opinion. It appears from the report of a commission appointed by the Governor of New York in 1903 that in one of the appellate courts sitting in the city of New York the average number of opinions written by each judge per year was considerably more than one hundred, in addition to which he had to examine and record his concurrence with or dissent from about four hundred other opinions in cases in which he sat, and participate in the discussion of about two hundred additional cases in which no opinion was rendered. Of course allowance

should be made for the fact that in Marshall's time the Supreme Court justices did much work besides, sitting in the courts of first instance; but after all possible allowance on this account, the disparity is still enormous.

I believe it to be a fact that few if any of the federal appellate courts, or similar courts in any of the larger states, can at the present time secure that assistance from counsel, allow that time for oral argument, go through that subsequent examination of the authorities, discuss and analyze the general principles of law, public policy, and ethics with that thoroughness, or observe that care in formulating the arguments approved and the decision reached, which are theoretically incidental to the development of judge-made law. Certainly all these things cannot be done in more than a small proportion, if any, of the cases presenting complicated facts or novel features. The time allowed being insufficient, the character of the work upon each case, taken by itself, must and does progressively deteriorate. Very likely each appellate judge performs now more labor, and doubtless he disposes of much more litigation, than his predecessor of half a century ago. Considering the amount that he disposes of, he generally approximates surprisingly well to the right decision in the particular case; thus probably doing more good on the whole than his predecessor, who could do better work on each case taken by itself, but whose benefits reached a comparatively trifling number of his fellow citizens. But a man who may not be a John Marshall to begin with,<sup>1</sup> and who cannot give to a single case the time which John Marshall would have given to it had it arisen in his time, although an examination of the precedents at the present day would take many times as long as was necessary in the lifetime of John Marshall, cannot be expected to bestow on it the care which was then or for a generation thereafter considered absolutely requisite. It is too much to ask of him an opinion which, in addition to being a reasonable approximation to justice in the case before him, shall also satisfactorily serve as evidence of the law on the subject for the future. No wonder that he himself, to judge from the internal evidence of his opinions, rates the language of any young textwriter as high as he does the *dicta* of his own court; and that the latter, if terse and pithy, he quotes without much investigation as to whether they had been *obiter* or not.

Nevertheless the judges and the bar and community at large have all continued nominally to treat the doctrine of *stare decisis* as still in full force; and with all the modern difficulties in their way, so many judges stand bravely by it that the citizen must always be prepared to have it enforced against him in a given case with a rigidity

<sup>1</sup> I do not go into the question of the ability and learning of the judge elected under present political conditions, as compared with his predecessors.



and technicality that would have been quite improbable in the days when time permitted the precise state of facts and the precise line of reasoning underlying each previous authority to be more carefully analyzed, and tacit limitations to the breadth of its statements recognized. On the other hand, as the wilderness of authorities presented upon the briefs of counsel tends every year to become more hopeless, the courts in general tend more and more to decide each case according to their own ideas of fairness as between the parties to that case, and to pass the previous authorities by in silence, or dispose of them with the general remark — one of those remarks that the recording angel is supposed to overlook — that they are not in conflict. Different men, however, are of different minds. As the time spent upon oral argument and subsequent consideration of each case tends to lessen, the chances of difference in decision of two substantially similar cases coming before different sets of judges, or even before the same judge in different years, tends to increase. Apparent conflicts of authority thus arise. Subtle distinctions are taken in order to reconcile the conflict if possible. The law is thrown into doubt, and a lawyer thereafter cannot advise his client how to act in order to enjoy his rights and keep out of harassing litigation. The point in conflict reaches the court perhaps again and again, and distinctions grow subtler and subtler, until once in a while a happy solution is found by holding that some then comparatively recent case, although avowedly but distinguishing the early ones in some incomprehensible manner, really overruled them. Thus for a moment the doctrine of *stare decisis* fails to operate, and by its failure the law is clarified, reason triumphs, useless litigation ends, and the citizen learns how in one contingency to protect his rights.

Various plans for cutting down the bulk of the current reports have been under discussion for the past twenty years, but up to this time none has been found to which the objections raised have not been sufficient to prevent any effective propaganda.

It has been suggested that the reporting of dissenting opinions be forbidden. But these are often of great value in showing the exact scope of a decision, and when the court is nearly equally balanced they may be almost as weighty as the prevailing opinions in the courts of other jurisdictions.

It has been suggested that the judges designate which opinions shall be officially published, and that they restrict the publication within narrow limits. But opinions are public records. The bar insists upon their right to cite cases, whether reported or unreported in the official series. Often the cases thus unreported turn out to be among the most important precedents. It has always been and still is common for the judges to exercise this power, but the usual result is that the profession have to subscribe to an unofficial series of



printed reports, and occasionally pay for certified copies of unprinted cases. A committee of the American Bar Association in 1898 reported that the power to determine which of their own decisions could be thereafter cited, and which should apply only to the case of the parties litigant then before them, was too dangerous a one to be confided to any court.

It has been suggested that the judges write fewer opinions, but this would be a partial abandonment of the very advantage which we have been taught to believe that we possess over the lawyers and litigants under other systems of jurisprudence. One of the functions of the judicial opinion is to help preserve the confidence of the bar and the public in the ability, learning, fairness, and open-mindedness of the judiciary as a whole, as well as the careful attention due to the particular case, by indicating the grounds upon which the decision is based whenever the case is one not entirely clear. Our bar generally prize the custom and would object to its abandonment. Its abandonment would tend to diminish that confidence in the courts which is one of the corner-stones of our governmental system. Moreover I think that every step toward the abandonment of opinion-writing would be a step away from the doing of justice in the individual cases before the courts. It is a fact whose knowledge is not confined to the bar, that the result of investigation of a difficult problem must be subjected to the test of setting the facts and reasoning down in ink, before the investigator himself can rest with confidence upon his own work. Formulation in writing of the reasoning in support of a decision that has been made leads not seldom to the discovery by the writer that the decision is wrong. A court which, as a general rule, writes a careful opinion upon every appeal, like the Supreme Court of the United States, shows a greater proportion of reversals; and this, I think, is because the natural tendency of an appellate court at first presentation of a case is usually to affirm, both from the presumption in favor of the decision below, and because, when that decision is erroneous, it is generally so because the superficial first impression of the case was followed without getting down to the bottom of it. Just as there is a conflict between the dispatch of business and the administration of justice, so there is often a conflict between the interests of the parties actually present before the court, which call for an explanation, and the interests of the clients and lawyers of the future, which are better subserved by silence.

It has been suggested that the individual judges make their opinions terser and less ambiguous, drop out all padding, reduce to a minimum the discussion of and quotation from previous authorities,<sup>1</sup>

<sup>1</sup> It is important that the custom of citing precedents by title should be preserved, because the most convenient means of ascertaining what has been decided upon any point is very commonly through the "Table of Cases Cited."

and cease altogether from expressing views upon subjects not absolutely necessary to the decision of the case in hand. That is a reform that undoubtedly ought to be made; but to expect it is hopeless. Few men seem to have the faculty of expressing themselves tersely and confining themselves to the point; and of these few men the majority have not the other qualities necessary to the attainment of public office. Nor can the public be expected to discipline even the worst judicial offenders. These are quite as likely as any to receive promotion or unanimous reelection. There are too many other elements to be considered in estimating the judicial personality. Nor can discipline in this matter be expected from the chief justice or other members of the tribunal. A man's style is too personal a matter. It is all that an appellate court can do to approximate to unanimity in its decisions. The small amount of time that it has to devote to the form in which its work is given to the public is shown by the occasional long tenure of office under the highest courts of grossly incompetent reporters.

I have not found any practicable suggestion toward materially reducing the mass of current judicial literature, although legislation might conceivably reduce to a comparatively small compass the judicial literature of the past without depriving us altogether of the benefits of our judicial law. A statute is very often enacted for the sole purpose of repealing the rule of law established by some particular judicial decision. Such a statute is never accompanied by a repealing clause, expressly declaring the case to be not the law; but conceivably it might be. Conceivably a statute might officially declare that the rule of *stare decisis* should not apply to a given reported case because it is disapproved or has been overruled; or that the case should not be cited because it is obsolete or of insufficient importance. England has published an official edition of her statutes so far as they are now recognized as remaining in force. Those not in force are officially omitted, and nobody need ever again waste time and effort over the question whether or not they are still alive. New York has this year appointed commissioners for a like purpose. A similar process might conceivably be applied to our judicial literature, and an official list prepared of cases to which the doctrine of *stare decisis* should, in future, be restricted. If the plan be practicable, we can well afford to employ our highest talent for the purpose. The official list would not need to declare that every case upon it were necessarily the law in all respects. But it would be accompanied by a provision forbidding the future citation of any that had been omitted, on the ground that they have been officially found to be abrogated by statute, or overruled, or obsolete, or dependent upon questions of fact alone, or mere useless repetitions of rules otherwise fully settled. It may be possible that some

such plan will be somewhere tried in the future in connection with a codification of the unwritten law.

Codification is the one and only remedy that has ever been suggested which amounts to more than the mildest palliative, and which has received substantial support from any influential section of the profession and the public. Fifty years ago it seemed in fair way of accomplishment, and as late as 1886 the American Bar Association, after a long debate, adopted by a small majority a resolution that the law itself should be reduced, so far as its substantive principles are settled, to the form of a statute. The committee reporting in support of this resolution said that whatever has heretofore been settled by the decisions of the courts should be evidenced by codification, leaving to the courts to continue the natural development of the law. A majority of the influential American lawyers, however, have continued to oppose a codification of the law, and have succeeded in preventing even its serious consideration. At about the time of the favorable action of the American Bar Association, the New York City Bar Association defeated by a large majority even so conservative a proposition as that the present English system of codifying the unwritten law upon special subjects, one at a time, be taken up.

The main real obstacle to codification in America is undoubtedly the experience which we have had of codification in particular, and of statutory law in general, in the past. The inartisticity, clumsiness, obscurity, and verbiage of the ancient English statute is proverbial. The old-fashioned lawyer held all statutes in contempt. The ancient form was inherited by America; and while from early days noted examples of clear and skillful drafting were incorporated in our statute-books, nevertheless the art was one little cultivated, and there remained much ground for the common saying that, however obscure the unwritten law might be, the written law would always be worse still; that the flexibility — a somewhat doubtful matter — of the judge-made law would be lost, and nothing of value would come by way of compensation.

Owing to the clumsiness of the old English statute, and the consequent necessity of arbitrary judicial intervention in order to secure for it anything like a reasonable operation, the courts adopted certain rules of construction which make it very difficult to draft a statute in simple terms which shall, nevertheless, fulfill in all respects the wishes of the statute-maker. If the courts had always construed every statute according to its plain language, probably legislators would soon have taken more care, adopted the custom of employing able counsel, and attained a degree of literary skill which would have justified a continuance of that system of construction. The experiment, however, was never tried. When a statute comes before the court its plain letter is subject to be violated by such pre-

sumptions as that the legislators did not mean to change the prior law, and that they did not intend to violate public policy (that is, the political views of the court acting *quasi*-legislatively), and that the letter is to be subordinate to the spirit (as the spirit may appear to the judges). When by the aid of these presumptions the courts have — as they often have — thwarted the purpose and contradicted the real intent of the legislators, the latter have sometimes submitted, and sometimes adopted additional legislation to make their purpose and intent unmistakably clear and unavoidably enforceable. Here, however, they are hampered by the custom of remedying all judicial errors by affirmative legislation, instead of by a declaratory statute annulling the obnoxious decision. If the courts introduce a series of unintended exceptions, each of these exceptions is thus made the subject of a special statute; for the custom of our statute-makers, except in periods of codification, is to deal only with the particular evils that have already been experienced, making each specific case the subject of a specific statutory remedy. Thus a code originally drawn with science and art, in the form of a series of general propositions, loses its symmetry and becomes a wilderness of special instances. Then comes a recodification, intrusted to the hands of some incompetent recipient of legislative or executive favor. The codification in such hands introduces new ambiguities, the process of judicial construction and legislative amendment goes on with increasing velocity, and the condition of things becomes worse in general public opinion than it was in the now forgotten days before the process of codification first commenced.

These, however, are avoidable evils. Whatever is known is capable of being expressed in clear and unambiguous language. It is perfectly possible, and to some persons it is quite easy, to draw a statute clear enough to settle every question arising within its purview except questions so unusual, or so near the border-line, or so unforeseen, that under any system of law they would naturally result in litigation. Of course so many exceptions and errors and anomalies have crept into our law at present that a codification which amended nothing would read a little like the chapter on irregular verbs in a grammar. But it could be done so that the present law would be far more easily discoverable than it is now, and, when discovered, just as clear; and the errors and anomalies, together with the great mass of the exceptions, ought to be corrected in a proper codification.

The main difficulty in codification is to secure the right man to do the work. "The codification must be done by the right man (which involves the proposition that until the right man is found the codification had better be let alone). . . . He must have had a long and varied practice at the bar. He must be a theorist. He must have



a very broad and practical mind. He must have an eye for the minutest point of grammar or construction. He must have a very simple English style.”<sup>1</sup> When an absolute monarchy is ruled by a man who is anxious to secure a codification of the laws, and is a good judge of human nature, and understands the subject well enough to know what kind of a man can best take it up, then we may expect work of the class of the Code Napoléon. In a republic, particularly a republic based upon the Montesquieu system of checks and balances, where the legislature provides the job but the executive dispenses the patronage, the chances of getting the right man are remote. The ease of finding the wrong man, and the natural results thereof, are illustrated by instances so familiar that they need not be mentioned. Not only is it harder for a republic to find the right man, but it is harder for a republic, when he is once found, to persuade him to take up the work. A Napoleon can assure him that, if his work is on the whole well done, it will have the necessary support and will achieve practical results. In a republic, nobody can assure him support. However conspicuously it may deserve enactment, it is very likely to be laid quietly upon the legislative shelf, or, if it is enacted in any form, to have its symmetry and its science utterly marred by ill-considered amendments. Not only is it difficult to procure the adoption of any one of the reforms necessary to make the law consistent and reasonable and just upon any subject, but if, as true codification demands, a considerable number of substantial changes in the existing law are introduced, that very fact is likely to result in the failure of the entire work. Almost every effective action of a legislative body changes the existing law, and yet, when a codification is introduced, the cry that “it changes the existing law” is generally enough to kill it.

I believe that codification will be accomplished within the lifetime of men who are already admitted to the practice of the legal profession; and I believe that either it will be accompanied by the avowed abolition of the doctrine of *stare decisis* and substitution of the Continental method of treatment of judicial decisions, or else it will be accompanied by some such legislative sifting of the reports as I have outlined by way of suggestion; but I do not believe that it will be done until the present system has become so overloaded that the American bar, with substantial unanimity, will decide that almost any kind of codification would be an improvement. Meanwhile the work of the future codifier is being made daily more easy: on the one hand by the multiplication of text-books in which the present law is stated with a considerable degree of terseness and approach to accuracy; and on the other hand by a continual multiplication of conflicts in authority and a continual weakening of pro-

<sup>1</sup> New York State Bar Association *Reports*, vol. xxvi, p. 94.



fessional respect for precedent, just because it is precedent, so that the future codifier will be less embarrassed by the difficulty which constituted one of the weaknesses of David Dudley Field's famous Civil Code — the fear of overruling decisions which stand in the books as the law at the time when a code is drafted, although subsequently their erroneousess may be conceded and they one by one be overruled by the courts or repealed by the legislature. I have not sufficient confidence in the official distributors of public patronage to believe that any successful codification will emanate from persons nominated by a president or governor and confirmed by a senate, unless the nominations are practically dictated by the unanimous voice of the bar. I believe that the first successful American Code of Private Law will emanate from some one of our American State Bar Associations, amendment of the law at whose behest is already no infrequent occurrence. The association will either do the work itself and afterwards force it through the legislature of the state which shall first try the experiment, or else put through a bill for codification, dictate the appointment of the codifier, assure him support and protection, and compel some subsequent legislature to make good the assurance.

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#### SHORT PAPER

HON. WILLIAM H. THOMAS, of Montgomery, Alabama, presented a paper to the Section on the subject of "Individualism *vs.* Law."

# REFERENCE WORKS RELATING TO THE DEPARTMENT OF JURISPRUDENCE

*(Prepared by the courtesy of Dean George W. Kirchwey, Columbia University)*

## GENERAL JURISPRUDENCE

AUSTIN, Lectures on Jurisprudence.  
HOLLAND, Elements of Jurisprudence.  
MARKBY, Elements of Law.  
LORIMER, The Principles of Jurisprudence.  
LIGHTWOOD, The Nature of Positive Law.  
BEAUSSIRE, Principes du Droit.  
DE VAREILLES-SOMMIÈRES, Principes Fondamentaux du Droit.  
VON IHERING, Der Zweck im Recht.  
ANZILOTTI, La Scuola del Diritto Naturale.

## INTERNATIONAL LAW

### PUBLIC

ALBERICO GENTILI, De Jure Belli.  
GROTIUS, De Jure Belli ac Pacis.  
VATTEL, Le Droit des Gens.  
BYNKERSHOEK, Quaestionum Juris Publici.  
PUFFENDORF, Le Droit de la Nature et des Gens, par Barbeyrac, 5th ed.  
BURLAMAQUI, Principes du Droit de la Nature et des Gens.  
ORTOLAN, Diplomatie de la Mer.  
WHEATON, Elements of International Law, Dana's ed.  
PHILLIMORE, Commentaries upon International Law.  
AZUNI, Droit Maritime de l'Europe.  
BLUNTSCHLI, Le Droit International Codifié.  
CALVO, Le Droit International.  
HALLECK, International Law.  
HALL, International Law.  
KENT, International Law.  
MARTENS, G. F., Précis du Droit des Gens.  
TWISS, Law of Nations.  
RIVIER, Principes du Droit des Gens.  
PRADIÈRE-FODÈRE, Traité de Droit International.  
WOLFF, Principes du Droit de la Nature et des Gens.  
HOLTZENDORFF, Handbuch des Völkerrechts.  
HEFFTER, Das Europäische Völkerrecht der Gegenwart.  
MARTENS, P. DE, Traité de Droit International.

### PRIVATE

FOELIX, Le Droit International Privé.  
STORY, Conflict of Laws.  
BAR, Private International Law.  
WESTLAKE, Private International Law.  
BROCHER, Cour de Droit International Privé.  
DICEY, Conflict of Laws.  
BEALE, Cases on the Conflict of Laws.

CONSTITUTIONAL LAW

ENGLISH

ANSON, Law and Custom of the Constitution.

DICEY, Introduction to the Study of the Law of the Constitution.

AMERICAN

STORY, Commentaries on the Constitution of the United States.

COOLEY, Treatise on Constitutional Limitations.

THAYER, Cases on Constitutional Law.

THAYER, Origin and Scope of the American Doctrine of Constitutional Law.

CURTIS, Jurisdiction, etc., of the Courts of the United States.

CONTINENTAL

BLUNTSCHLI, Gemcines Staatsrecht.

SCHMIDT, Allgemeines und Deutsches Staatsrecht.

TRIPPIER, Constitutions qui ont régis la France.

ADMINISTRATIVE LAW

GENERAL

VON SARWEY, Allgemeines Verwaltungsrecht.

VON KIRCHENHEIM, Einführungen in das Verwaltungsrecht.

GOODNOW, Comparative Administrative Law.

ENGLISH

GNEIST, Das Englische Verwaltungsrecht der Gegenwart.

FRENCH

BERTHÉLMY, Traité élémentaire de Droit administratif.

GERMAN

DE GRAIS, Grundriss der Verfassung und Verwaltung in Preussen und dem Deutschen Reiche.

ITALIAN

ORLANDO, Primo Trattato Completo di Diritto Amministrativo Italiano.

SPANISH

POSADA, Tratado de Derecho Administrativo.

AMERICAN

GOODNOW, The Principles of the Administrative Law of the United States.

PRIVATE LAW

ROMAN LAW, ANCIENT AND MODERN

FONTES JURIS ROMANI ANTIQUI (Bruns).

COLLECTIO LIBRORUM JURIS ANTEIUSTINIANI (Krueger, Mommsen, Studemund).

CORPUS JURIS CIVILIS (Krueger, Mommsen, Studemund).

CUJACIUS, Opera Omnia.

POTHIER, Opera.

SAVIGNY, System des Römischen Rechts.

WINDSCHEID, Lehrbuch des Pandektenrechts.

## 656 BIBLIOGRAPHY: DEPARTMENT OF JURISPRUDENCE

### FRENCH

TRIPLIER, *Les Codes Françaises*.  
BAUDRY-LACANTINERIE, *Précis de Droit Civil*.  
LAURENT, *Principes de Droit Civil*.  
ZACHARIA V. LIGENTHAL, *Droit Civil Français*.

### SPANISH

LEX VISIGOTHORUM (*Fuero Juzgo*).  
LAS SIETE PARTIDAS.  
CODIGO CIVIL.  
SALA, JUAN, *Iustracion del Derecho Real de España*.  
SCAEVOLA, *Legislacion Española*.

### ITALIAN

CODICE CIVILE (Camous).  
CUZZERI, *Il Codice Italiano di Procedura Civile Illustrato*.  
CODICE PENALE (Camous e Luschi).  
LOMONACO, *Istituzioni di Diritto Civile Italiano*.

### GERMAN

DEUTSCHES BÜRGERLICHES GESETZBUCH.  
DEUTSCHES STRAFGESETZBUCH.  
FECHNER, *Die Reichsjustizgesetze*.  
DERNBERG, *Das Bürgerliche Recht des Deutschen Reichs und Preussens*.  
STOBBE, *Deutsches Privatrecht*.

### AUSTRIA

HERZFELD, *Das Österreichische Allgemeine Bürgerliche Gesetzbuch*.  
UNGER, *System Österreichischen Allgemeinen Privatrechts*.

### HOLLAND

FRUIN, *Niederlandsche Wetboken*.

### ENGLISH AND AMERICAN

GLANVILLE, *Treatise on the Laws and Customs of England*.  
BRACTON, *De Legibus et Consueudinibus Angliæ*.  
LITTLETON, *Tenures*.  
COKE, *Institutes of the Law of England*.  
BLACKSTONE, *Commentaries on the Law of England*.  
KENT, *Commentaries on American Law*.  
POMEROY, *Treatise on Equity Jurisprudence*.  
HOLMES, *The Common Law*.  
WIGMORE, *The Law of Evidence*.

### CANON LAW

HINSCHIUS, *Kirchenrecht der Katholiken und Protestanten*.  
FRIEDBERG, *Lehrbuch des Katholischen und Evangelischen Kirchenrechts*.

## REFERENCE WORKS TO ACCOMPANY THE SECTION OF CONSTITUTIONAL LAW

*(Prepared by courtesy of Professor Ferdinand Larnaude, University of Paris)*

- ASCHEHOUG, Das Staatsrecht der Vereinigten Königreiche Schweden und Norwegen.
- AUCOC, Rapport à l'Académie des Sciences Morales et Politiques sur le Concours relatif à la Séparation des Pouvoirs.
- BOUTMY, Études de Droit Constitutionnel.  
Esquisse d'une Psychologie Politique du Peuple Américain.
- BRYCE, The American Commonwealth.
- BURGESS, Political Science and Comparative Constitutional Law.
- COOLEY, A Treatise on the Constitutional Limitations.
- COXE, Essay on Judicial Power and Unconstitutional Legislation.
- DARESTE, La Justice Administrative.
- DICEY, Introduction to the Study of the Constitutional Law.
- DUCROCQ, Cours de Droit Administratif.
- DUGUIT, La Séparation des Pouvoirs et la Constituante.
- ESMEIN, Éléments de Droit Constitutionnel Français et Comparé.
- FUZIER-HERMANN La Séparation des Pouvoirs d'après l'Histoire et le droit Constitutionnel Comparé.
- FAUSTIN HÉLIE, Traité de l'Instruction Criminelle.
- DE FRANQUEVILLE, Le Système Judiciaire de la Grande Bretagne.
- THE FEDERALIST.
- GRASSO, La Costituzione degli Stati Uniti dell'America Settentrionale.
- GARNOSNET, Traité théorique et pratique de Procédure.
- GOODNOW, Comparative Administrative Law.
- JOUSSE RANDOT, Du Pouvoir Judiciaire et de son Organisation en France.
- LABAND, Das Staatsrecht des Deutschen Reiches.
- LABOULAYE, Histoire des États-Unis.
- LAFERRIÈRE, Traité de la Juridiction Administrative et des Recours Contentieux.  
Histoire des Rivalités entre les Parlements, les Intendants et le  
Council du Roi depuis le Règne de Louis xiv jusqu'à la Révolution  
de 1789.
- LARNAUDE, Étude sur les Garanties Juridiciaires qui existent dans certains pays  
au profit des particuliers contre les actes du Pouvoir Legislatif.
- MONTESQUIEU, Esprit des Lois.
- MICELI, Analisi Giuridica della Nozione d'Incostituzionalità.
- DE NOAILLES, Cent Ans de République aux États-Unis.
- ORLANDO, Teoria Giuridica delle Guarentigie della Libertà.
- POSADA, Tratado de Derecho Politico.
- SAINT-GIRONS, Essai sur la Séparation des Pouvoirs dans l'Ordre Politique.  
Administratif et Judiciaire.
- STUART-MILL (JOHN), On Liberty.
- THAYER, The Origin and Scope of the American Doctrine of Constitutional Law.  
John Marshall.  
Cases on Constitutional Law.
- WALKER, Introduction to American Law.
- WILSON (Woodrow), The Congressional Government.
- WILLOUGHBY (W. W.), The Supreme Court of the United States.





DEPARTMENT XXII — SOCIAL SCIENCE



## DEPARTMENT XXII—SOCIAL SCIENCE

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(Hall 1, September 20, 2 p. m.)

CHAIRMAN: MR. WALTER L. SHELDON, Ethical Society, St. Louis.

SPEAKERS: PROFESSOR FELIX ADLER, Columbia University.

PROFESSOR GRAHAM TAYLOR, Chicago Theological Seminary.

IN opening the work of the Department of Social Science the Chairman, Mr. Walter L. Sheldon, of St. Louis, spoke as follows:

“ It is now almost three quarters of a century since Auguste Comte began issuing his *Cours de Philosophie Positive*, for which he coined the now much-worn term ‘ Sociologie.’ So it is that we connect the birth and development of this science chiefly with the nineteenth century, although its beginnings are to be traced long before. Whatever may have been the crudities or defects of the *Système* by Comte, surely the suggestion on his part was a luminous one and of far-reaching significance, that we should study and analyze the phenomena of human society for the purpose of discovering laws or regularities there, just as we study the phenomena of chemistry or of astronomy. It was inevitable, however, that these hints should have remained in the background and have had comparatively little influence until the doctrine of evolution had been launched in full force later in the century. In spite of ourselves we cannot help connecting the advance of sociology with the great new step taken in biology through Charles Darwin. The abstractions of Comte had to be laid aside or go on the shelf, while the new science he had inaugurated was to be brought into harmony with the doctrine of evolution as a whole.

“ To-day we are discussing the problems of sociology as if they had been under consideration for hundreds of years. We can scarcely realize that it is only about a quarter of a century since Albert Schaeffle attached his name to the preface of the first volume of his *Bau und Leben des Socialen Körpers*, and Herbert Spencer put forth his *Principles of Sociology* as a part of his great *Synthetic Philosophy*. It may be that these men linked the new science too closely to that of biology, because of the sudden and startling developments in the latter department of research. But of one thing we are certain: These men have settled the fact beyond dispute that there is such a thing as a science of sociology. One university after another has been establishing chairs in this special department, and one man after another has been consecrating his life to researches in this direction, until now we have a whole literature pertaining to

this subject, and a large corps of scholars, all following out the original suggestion of the father of the *Positive Philosophy*.

"On the other hand, there was another step equally inevitable. Just because this new science dealt strictly with human things, the conviction arose that it should be *harnessed into service*; that the discoveries which these men made should also be put into practice or applied for the future regulation of human society. On this very afternoon, as we know, there will be two separate departments of sociology holding sessions, one of them dealing with the science as such and the other with it on the 'regulative' side.

"As the twentieth century opens, we see, therefore, that sociology is already breaking up into a number of subordinate sciences. In all probability there will be no further extensive treatises published dealing with this science as a whole. The field is too great and each of the special departments too important. Men will now begin to devote their whole lives to the separate study of one domain within the larger field, as we can observe in glancing down over the 'sections' which are to meet on the ensuing days.

"But still further. The conviction is growing, after three quarters of a century of research, that we are dealing here with spiritual problems far more than with problems of biology. While we accept the fact once for all that the human race in its associated life furnishes the material for an actual science, we are also coming to believe that the laws and the phenomena here have a peculiar character which should perhaps put them upon a separate plane. It is men on the *spiritual* side who are to be studied, and whose associations are to be regulated through the discoveries and the laws of sociology. In the 'regulative' aspect we are on the border-line between this science and that of ethics. In discussing 'social regulation' we are dealing with the problems of good and evil, how the evil may be repressed and how the good may be fostered in society as a whole. We are to consider how we may put to practical use all that is being found out or is yet to be disclosed in the sphere of the larger science of sociology. In a word, we are concerned to discover not only how social institutions have been regulated in the past, but also how we may guide them in a given direction for the future. Our problems here are of a special kind, and it is the great department of applied ethics to which they belong. From this aspect our chief interest lies in the reconstruction of human society. At this point the man of science must also become the reformer."



## THE RELATION OF ETHICS TO SOCIAL SCIENCE

BY FELIX ADLER

[Felix Adler, leader of the Society for Ethical Culture, New York, Professor of Political and Social Ethics, Columbia University. b. Germany, August 13, 1857. A.B. Columbia University; Ph.D. Heidelberg University. Member of the Editorial Board of the *International Journal of Ethics*. Author of *Creed and Deed*; *Moral Instruction of Children*; *Life and Destiny*; *Religion of Duty*; *Essentials of Spirituality*.]

THE subject which I shall treat in this paper is the relation of ethics to social science, or, more precisely, I shall endeavor to answer the question, Is social science capable of furnishing ethical imperatives? As the field to be traversed is extensive, and the time short, I shall have to state my thought as succinctly as possible, and forego the advantage of detailed elaboration and illustration.

And let me begin by asking why it is that many persons at the present day are turning with a view of obtaining ethical guidance into a new direction; why a new science, like social science, is expected by them to furnish us with laws of conduct. The moral philosopher, the legislator, the religious teacher have heretofore been called upon to perform this task. Why is it that the social scientist should be expected to relieve these of their function? The reason is that we are in a state of ethical distress, and this in two particulars. The moral code which we have received from the past no longer adequately fits the needs of modern society. On many urgent problems of the present day, such as the problem of readjustment between the social classes, the problem of the extension or limitation of the functions of the state, the problems of the family, — problems all of which are felt to be ethical in their nature, that is, dependent for their solution on a just conception of the ends for which society exists, — the moral codes of the past shed but an insufficient and uncertain illumination. An enrichment of the moral code is needed, and in the hope of obtaining this enrichment of the content of morality the faces of men are set in the new direction.

Again, we find ourselves in a state of ethical distress because the authority of the prescribed morality in many quarters is being questioned. A widely prevalent skepticism, whether well founded or ill founded, exists. How shall we act in difficult and complex cases? What rules of conduct shall we employ? is the one question men put to themselves. And why should we act thus and not otherwise? Why should we submit to these onerous rules? What is the nature and ground of the authority which they claim over our wills? is the

other question. The authority of revealed religion is challenged by many. The authority of the builders of metaphysical systems is still more exposed to skeptical doubt. Is there not some way of putting *terra firma* under our feet, of securing a foundation for individual and collective conduct on which all men can agree? A foundation in fact, we are told, rather than in theory is needed, especially in view of the conflict of ethical standards, of the almost hopeless divergence of the points of view from which men regard those problems, which yet must be solved by concerted action. Should we not attempt to bring about harmony in men's thinking about social questions as the indispensable condition of securing harmonious conduct? And is there, apart from religion and metaphysics, which tend to divide rather than to unite men, a hope of securing such harmony in the sphere of thought? At this juncture, finding ourselves at such a pass, or rather at such an apparent *impasse*, there rises before the mind the great and commanding figure of Science. Science has actually achieved the difficult task of bringing about agreement in the field of physical research, and, basing on this agreement, it has brought about in a short time an almost incredible increase in man's physical welfare. Cannot Science be trusted to achieve similar results in the social field, to supply the authority which we lack by determining the ends of pursuit to which all conduct should converge, and, at the same time, to enrich the code by closer study of the means which, human nature and human conditions being what they are, will conduce to these ends?

It is for these reasons that many persons are turning to social science for help, both because it is a science and its methods are the same as those which have been accredited in other fields, and because the wealth of the data at its command promises to furnish sufficient material for enlarging and enriching our ethical knowledge. We may add that, as in the case of every new science in its initial stages, the expectations as to what it can accomplish are naturally exaggerated; and thus we can understand how the hope has arisen that the science of society will become a sort of social savior and will relieve us from our ethical distress.

But can social science fulfill these expectations? Misdirection of effort because of false anticipation of result are sure to be paid for in the end by waste and disappointment. Are we to push headlong into the new path thus opened to us, without previous consideration of the goal to which it can lead? What is it in the nature of social science to accomplish, and what in the nature of the case is beyond its reach? These surely are questions which at a time like the present it is the part of sanity to put to ourselves. My answer in this paper will be that it can enrich the code but cannot supply the authority for the code; that it is incompetent to determine the ends of social

and individual conduct. In the endeavor to make good this position, I shall first apply a practical test to some of the particular social sciences and inquire whether, for instance, the study of the past development of the human family affords us a clue to the type of the family which we should endeavor to realize in the future, or whether the study of the past development of industrial society affords a clue to the desirable constitution of industrial society. I shall next apply the same test to the general science of society, or sociology, and inquire whether it has discovered general laws which we can utilize in every department of social improvement. Thirdly, I shall subject to a brief criticism the fundamental notion of scientific law itself, with a view to ascertaining whether it can be applied, without radical qualification, to the domain of human conduct, so as to include the uniformities which we discover in the social life of men.

To begin with the subject of the family. We have been accustomed to regard the family as the sanctuary of civilization, through which all those interests that make life worth living are perpetuated from generation to generation. And yet the family is actually changing under our very eyes, and is bound to some extent to alter its character. In what direction shall we permit it or help it to do so? What principles or point of view shall we adopt in regard to it? Shall we, for instance, prohibit divorce altogether? Shall we adopt the ideas of those who hold that when love ceases, that is, the thing they call by that name, marriage should cease? Or shall we take the ground that the monogamic institution has never yet disclosed its highest potentialities? Shall we endeavor to develop it further, but in such ways as to secure the more perfect manifestation of the idea underlying it, admitting the necessity of change, but insisting that change must be in the direction of greater stringency rather than in that of greater looseness? Or shall we take the side of the extremists, and advocate the dissolution of the family and the substitution of some such arrangement as is contemplated in Plato's *Republic*? Now can the branch of social science which is occupied with the study of the family help us in deciding the course which we ought to take? The researches of Bachofen, of McClellan, of Tylor, or Morgan, and of the others are of absorbing interest. They have widely extended our comprehension of the facts of social development. They have taught us that the monogamic family, which we had regarded as fixed and unalterable from the time of the first man and woman, has been the product of growth like every other social institution. They have acquainted us with types of domesticity and systems of consanguinity, of which, a generation or two ago, we had not even an inkling. But how does all this knowledge, interesting indeed, despite the many links that are still missing, the many customs and social arrangements that are still obscure, bear

upon our present situation? Does the study of what has been, in this instance, furnish a sure guidance to what ought to be? Does the explanation, or at least partial explanation of the past, disclose any sufficient principles upon which we can rely in our attempts to shape the future? Does the science of the family, if by that name it deserves to be called, supply us with criteria by which to measure the worth of the monogamic type of family as against other types, and the higher type of monogamy as against the lower types of it? There are two such criteria which we frequently find commended in sociological text-books. The one is social survival; the other, increased complexity. Now setting aside the initial scruple as to whether survival is a test of worth, dismissing for the time being the thought that a type of social organization which lasts only for a single generation, like the democracy of Pericles, may yet hold in the scale of worth a place more exalted than that of other types which have lasted for a thousand years; setting aside these considerations, I ask, does the monogamic family, measured by the test of survival, outrank for instance the polygamous family? In making this comparison, we are bound to relinquish momentarily our ethical bias, our strong repugnance to forms of union between the sexes which seem to us to degrade what is best; and to ask simply in the scientific spirit whether we are to promote monogamy because communities founded on the monogamic relation tend to survive, while other communities tend to perish? I do not see that on this ground, and apart, I repeat, from other ideal points of view, the monogamic family deserves the preference. I do not see that polygamous nations like the Turks have less chance of survival, are less tenacious, less virile fighters for example, than the Western nations with whom they come into collision. I do not think it can be made out that the polygamous Mormons are lacking in the qualities that promote survival, and that the resistance which they have offered to the pressure of the surrounding majority has been less vigorous and effective than would have been offered by a monogamous community holding in other respects the same tenets.

If next, instead of comparing the monogamous family with the polygamous, we examine the former on its own ground, from the point of view of survival, we shall find it still more difficult to arrive at a clear and definite decision, supported by the facts. We may compare, as Professor Giddings has done, the children born in wedlock with the offspring of irregular unions, or the children of parents whose union is permanent with those of parents whose unions are interrupted by frequent divorce; and it will then be easy to show that the chance of survival is greater in the case of permanent unions than in either of the two others. That is to say, it is easy to show that where permanent unions, because of ideals or standards pre-



valent in a given society, are alone regarded as honorable and valid, the children born in defiance of such ideals and social standards are likely to be physically and morally neglected, and in the struggle for existence are likely to succumb. But this is largely due to the disgrace which their existence entails upon those responsible for it. It is precisely because such temporary unions are irregular that they carry down the unfortunates who are their fruit. In a community like the Spartan, where what we should call illicit intercourse was freely permitted and where the children, provided they were physically healthy, received the same care and attention as the offspring of legal marriages, the same results would not follow. Nor can it be maintained that the Spartan community, regarded from the point of view of survival, ranks lower than other communities which have adopted a standard more nearly like our own.

The points thus far covered are these: (1) The test of survival does not decide between what we should call the higher form of marriage, monogamy, and what we should call the lower, polygamy. (2) Where monogamy prevails, the advantage possessed by the offspring of legitimate unions as against the offspring of illegitimate unions is due to the circumstance that in the former case the unions are regular, and in the latter case they are irregular. The facts do not prove that a system like the one contemplated in Plato's *Republic*, if it could be made regular, would be less efficacious in securing social survival. And in this connection let me point out how important a factor in what is called social environment are the ruling ideas dominant among a people, and how largely the survival of individuals within a group or community is dependent on agreement with the dominant ideas. Falling away from the ideal of one's group, whether it be the ideal of Sparta, or the ideal of a primitive horde, or the ideal of monogamy in an Anglo-Saxon community, leads to self-disparagement, to relaxation of effort, to a diminution of all the integrating forces of character, and, in consequence, to destruction. To prove, therefore, that in a community whose ideal is monogamic, persons who lead irregular lives, and the children of such persons, tend to go to the wall, is not to prove that monogamy itself is socially more preservative than other forms of marriage, but is merely another illustration of the general rule that a house psychologically divided against itself cannot stand; that members of a community who are in extreme divergence from the ideals of the community to which they belong cannot maintain themselves. But if the standard were different, the result might be different.

Again, it is said that the monogamic family is best fitted to survive because it is best fitted to transmit to posterity a "sound physical heredity and the results of the mental and moral civilization of the past." Our deep ethical bias in favor of the monogamic family



leads us to desire that this may be so, to seek in the facts a support for our convictions. And yet it is ever a perilous procedure to enter into transactions with empirical reality to such an extent as to make the validity of an ideal depend on the countenance given to it by the facts. The ethical rule is true, though no experience as yet should bear it out, though the experience of the human race thus far in some respects should rise up to testify against it. As regards the above statement, however, two abatements at least need to be considered. Pure monogamy, in Western civilization, does not exist. What we actually find is a nucleus of sheltered homes surrounded by an extensive fringe of baser types of the sex relation. Premarital self-control especially is rare, in the great cities conspicuously so, but also in the rural districts. Whoever has had the opportunity to look beneath the fair-seeming surface of things, and to familiarize himself with the conditions that actually prevail, is aware how deeply the poison which comes from the surrounding fringe or margin penetrates into and infiltrates the monogamic nucleus, to how alarming an extent the physically sound heredity claimed in the above proposition is lacking. The question, therefore, which we are bound to consider, always speaking from the standpoint of social survival, is not whether monogamy and the premarital self-control which is an indispensable adjunct to it, would conduce to sound heredity if they were general, but in view of the fact that they are not general, and that the strain which they put on the instincts of men seems in many cases in excess of the moral force adequate to sustain it, whether, in view of this fact, from the point of view of survival, it were better to maintain the present condition or to adopt Plato's plan, or some other like it, and to abandon the mixed type, partly monogamic, partly extra-monogamic, which is now prevalent, as tending under the circumstances toward social degeneration? Or, to put the matter in another form, the question is whether the proportion of perfectly sound men and women who enter into marriage and remain sound is sufficient to guarantee that the offspring of existing marriages as a whole shall possess the physical qualities necessary for survival; whether, in other words, the remnant of the righteous is sufficiently numerous to leaven the lump? I am not aware that the science of the family has any illumination to give us on this question, or that our knowledge of the punaluan family, and the rest, can be of use in enlightening us upon this problem.

(As a matter of fact I take it that those who are ethically minded consider only a single point, namely, whether the monogamic constitution of the family comports with what is morally exacted. They do not doubt that if a society existed in which perfect monogamy were realized, such a society, among other excellent advantages, would

surpass competing societies in point of endurance. But whether a society with monogamy imperfectly constituted can outlast societies with lower family systems more perfectly organized, is a question upon which they do not stop to reflect. If existing society, on the way toward perfection, must perish, be it so. If the very fact that it is intermediate between a lower form more perfectly organized and a higher form not yet perfectly organized be the cause of its destruction, let this cause operate to produce its effects. Ideas and institutions do not exist for the sake of a given society, but societies exist for the sake of working out the ideas, and the institutions in which these ideas express themselves.)

Again, it is said that the monogamic family is the most suitable organ for the transmission of the results of mental and moral civilization to future generations. It is held to be so because it is the most adequate instrumentality for the cultural development of the married pair themselves through their mutual influence on one another, and also for the development of individuality in the children, and for putting them in possession of a varied and unified culture. But if we hold against this account of what the monogamic family is ideally, or what it might be, a picture of what it is, to how great an extent shall we find that the latter is in contradiction with the former! In how many cases does the close contact of two persons of opposite sexes in marriage actually mean the narrowing of horizons, the lowering of standards, mutual accommodation on the part of each to the defects and blindnesses of the other, the abandonment rather than the pursuit of cultural ideals. And so far as the children are concerned, how often are the parents the chief obstacles to the better education of their children; how little fitted, by nature and acquirement, are a very large proportion of parents to undertake the difficult task of child nurture and training. How often have pedagogues expressed the conviction that the parents must be educated before the children can be; and out of this vicious circle how shall we escape? The outcome of my remarks is, that the worth of ideas or ideals cannot be determined by their immediate results either in point of survival or in point of cultural results achieved; that ideals must be approximated to because they ought to be; and that as for the results, in the last analysis we must leave the squaring of them, with the ideal demands, to the Power in things whence those disquieting and urgent ideals have come to us.

I have enlarged on the subject of survival because it is apt to be the final appeal of those who seek to explain the development of human society in terms of natural law, and who for this reason attribute to social science the prerogative of erecting standards and prescribing laws of conduct. Alongside of survival as a test, however, is often mentioned the so-called law of increasing differentiation

coupled with more perfect integration as a distinguishing mark of the higher types of social living, of those types which, because they are higher, we ought to favor. Let me briefly remark, at this point, that simplification rather than differentiation—even though the differentiation be accompanied by integration—seems to be in many ways the sign of progress. The monogamic family itself (I need not say that I regard it as the higher type) is very much simpler than the form of family described by Morgan. The modern type of monogamic family is much less complex compared with the family of a few generations ago, when collateral relatives formed an integral part of the family group. The modern family, consisting of father, mother, and children, having very slight and unstable connection with aunts, uncles, and cousins, has developed along the lines not of differentiation but of simplification. It would, however, be a more precise expression of what I believe to be the facts, to say that progress is marked by a tendency to simplification in some directions, to differentiation in other directions. But what the relation of these two tendencies should be, in how far we ought to simplify life, in how far make it more complex—to this problem, what is called the general law of evolution, as formulated by Spencer and adopted by others, gives us, so far as I can see, not the slightest clue. In passing, I may observe that to formulate an equation between conduct moral and conduct highly differentiated seems to me most misleading. The conduct of a modern bank burglar is highly differentiated, and so far as he organizes the totality of his nefarious designs with a view to the achievement of a single purpose, it is also highly integrated. The conduct of an humble washerwoman in a tenement-house, who wears out her life in order to keep her children at school and to give them a better chance than she had herself, is undifferentiated and simple. But who will question the moral worth of conduct in the latter case, or fail in the former case to find it wanting altogether? The law of complexity is no guide.

A similar train of reflections, to refer briefly to other principal social problems of the day, will show, for instance, how little the study of religion can supply us with rules by which to shape the religious development of the future, how little the study of industrial development can aid us in determining the ends toward which the industrial development of society should be guided.

Take the science of religion. We have mastered the facts of animism, fetichism, ancestor-worship; we have psychologically reconstructed the steps that led to polytheism. We have penetrated, let us assume, the inner meaning of the religions of the Chinese, of Persia, of the Hindus, of the Greeks. We have traced the development of Hebraism up to the time of its junction with Hellenism; we have followed the wavering fortunes of Roman Catholicism and

of Protestantism; and, at the end of this long journey, what have we gained? We have gained, indeed, in breadth and in psychological insight, and our knowledge of the causes that contribute to the rise and fall of religious systems has been augmented; but as to the main point, as to the problem now before us, what shall be the next step in religion, how far are we helped? Does the test of social survival avail? The religious type which is largely regarded as the highest, the Protestant, is, if anything, a disintegrating rather than an integrating force. The Protestant religion in the United States, with its one hundred and forty-eight sects, divides the population in feeling and ideas. Indeed, it is the belief of many that if it were not for the emergence of other ideal centres of unity, such as the political ideal, an advanced nation like the American could hardly cohere, so manifold are the religious camps into which it has been divided and subdivided. The Protestant religion, as a socially preservative influence, can hardly compare with the influence of the Greek Catholic Church in Russia, or the influence of Roman Catholicism in the Middle Ages, or with that of Islam among its votaries to-day. Nor does the test of complexity avail, for Protestantism, with its emphasis on the individual, its simple ritual, surely cannot vie in complexity with its own predecessors in the West, or with a religion like Brahmanism in the East. The truth is, that the different religions do not constitute a progressive series. Each of the different stages of religious development, each of the great religious systems, has its own peculiar excellences and defects; each is governed by some ruling aspect or ideal; and if we condemn a religious system it is because the aspect of the problem of man's relation to the universe, of which it is the expression, because the idea which underlies it, fails to appeal to us. But as to the question which is the preferable aspect and which the higher idea, on what ground that religious science offers us can we possibly decide? It is true that religion is not an isolated phenomenon, but an element in the complexus of a whole type of civilization; and herein we find an additional ground of preference: We rate Protestantism higher than Buddhism because the idea of liberty appeals to us more strongly than the idea of Nirvana, or the quenching of the individual. In addition, we take into account the effect on human life produced by quietism on the one hand, and active self-affirmation on the other; and we find that in the one case there is absence of material progress and of progress in scientific knowledge, and in the other case a plethora of increasing comforts and extension of scientific knowledge. But what justifies us in rating comfort so high, or knowledge so high; and how are we to meet the contemptuous smile of the disciple of Buddha, who scorns the materialism by which we are choked, and the scientific knowledge that cuts off our spiritual outlook, and the self-assertion that keeps us forever restless, and tells us that the taste or the



merest foretaste of Nirvana is better than all these? It is then, at bottom, once more, the appeal of what is proposed as the end and aim of life that decides our preference. Survival, I repeat, does not decide. Buddhism is older than Christianity, its followers said to be more numerous; Buddhist society in its environment persists; so does Chinese society, based on Confucianism. Complexity does not decide. If then we still, many of us, believe that the next step in religion should be along the path opened up for us by Isaiah and Jesus, it is because in interrogating our inmost experience we find that the ideas expressed by these great teachers satisfy us and appeal to us to-day, not because of any wisdom we have gained from the study of fetichism or ancestor-worship or the rest.

The same informational wealth, coupled with regulative impotency, we meet with in the science which deals with the industrial development of society. The various forms of industrial organization are the expression, not merely of physical necessities, nor of methods of satisfying these necessities, but of such methods controlled by and subordinate to ideas. Slavery is based on the idea of the vicarious realization of the ends of the ungifted in the gifted, an idea which in a modified form has even been revived in modern times by Nietzsche and his school. Feudal serfdom is based on the idea of God-derived power in the master over the servant, and of responsibility connected with such power. The modern wage-system is based on the idea of individual liberty and on the assumed possibility, a possibility which may be doubted, of a just quantitative measurement of mutual services. It is not possible to arrange these systems in a simple progressive series. Each of them has its glaring defects, each also has merits which are absent in the others. Even slavery and serfdom have certain advantages wanting in the system that is expressed in the cash-nexus. At present the defects of the modern wage-system have become conspicuous, and divers changes are proposed. Some persons favor compulsory collectivism, others advocate a kind of industrial feudalism, others hold fast to the orthodox principle of *laissez faire* and unadulterated competition. Others, again, believe in a voluntary collectivism, with industrial competition preserved alongside. Analogies to these types may be found in the past; but a law of development which, on being recognized, would turn for us into an ethical imperative, has not been discovered. As before, we look in vain to the test of social survival, or of complexity, to put an end to our uncertainty. Each of the great types has operated toward social survival under appropriate conditions, and the question what type will survive under modern conditions is the very one upon which we are divided, and one which cannot be settled by an appeal to the facts of survival under conditions different from ours. The test of complexity likewise will not assist us, because the more advanced forms



of industrial development are characterized in some aspects by greater simplicity, while as to the differentiating movement which likewise is taking place, the fear whether it may not prove to be of such a nature as to disrupt society, and by breaking up social unity to destroy civilization, is the very question that most disturbs our peace.

We have thus completed the first of our tasks. We have examined some of the particular social sciences with a view of ascertaining whether in their special field they are capable of furnishing ethical imperatives, and we have been led to a negative conclusion. We have also, incidentally, fulfilled the second task we had set ourselves, viz., of inquiring whether the general science of society, or sociology, is capable of furnishing such imperatives. Fitness to promote social survival and increasing complexity are, so far as my knowledge of sociological literature goes, the only two definite standards which that science puts at our disposal for the regulation of conduct; we are to work for that kind of religion which will help the survival of the community and which is marked by greater complexity; for that type of the family which corresponds to the same requisites, etc., and it has been my attempt to show that these standards, when applied practically, are found to be unhelpful. In addition to these two tests or standards, however, sociological literature swarms with a multitude of other prescriptions which have no demonstrable connection with survival and complexity, and which are drawn from conceptions of the social end not derived by the sociologists themselves from the study of social science at all, but from convictions and prepossessions, which clearly they bring *ab initio* to the study of social science, and seem to interpret into it rather than to derive from it. Thus Comte, in virtue, doubtless, of his bringing-up and his surroundings, is biased in favor of an hierarchial arrangement of society, and of the supremacy of a spiritual directorate fashioned on the pattern of the medieval Church. Other sociologists regard altruism, or self-sacrifice, as the highest type of social behavior, though sometimes leaving us in doubt whether they regard the happiness which such self-sacrifice is supposed to promote as the chief end to be desired, or whether they regard the giving-up of one's happiness as the chief thing desirable, and the state of society in which self-sacrifice would become the prevailing type of conduct as the noblest outcome of evolution. Others make self-realization the end, and regard partial self-sacrifice as subordinate and incidental to self-perfection. Other sociologists frankly express their ideals in terms of quantity and, in the fashion of Bentham, pronounce the greatest happiness of the greatest number to be the social end, although they fail to make it intelligible why the happiness of the greater number should be cogent as an end upon those who happen to belong to the lesser number. Others again,

seem to regard freedom as the *summum bonum*, and set up universal contractualism as the desirable end. It is especially worthy of remark that among those whose descriptions of the social good betray the most aggressive individualism are prominent the very thinkers who, like Spencer, have done most to bring the biological or organic conception to the fore in their account of the natural development of human society. Their premises are organic, their conclusions are strictly individualistic. Can there be a more striking illustration of the absence of relation between premises and conclusion, between the study of the social facts and the conception of the social end? Indeed when we review the various conceptions of the social end that are proposed by the leading sociologists of the present day, we find the same divergence of standpoint which characterizes the metaphysical and ethical pronouncements, the symptoms of the same disease for which sociology was supposed to possess the cure. And, what is more, we find that these various conceptions of the social end are mere masks behind which are hidden the differences of metaphysical and ethical bias that have prevailed from time immemorial. The nomenclature has been somewhat changed, the background is somewhat different, but in the main we recognize old friends or old enemies with new faces.

There remains my third task, briefly to show that in the nature of the case the result cannot be otherwise; that in the strict sense there are no social laws, and, therefore, in the absence of laws there cannot be prediction of the future, or ethical imperatives based on the conscious adoption into the will of a natural order of social development. I would not, indeed, be understood as denying that social science is a science. Science is methodized knowledge. In this sense philology is a science, history is a science, and the study of society is capable of becoming, and has already, in part, become a science. Because, moreover, every science is methodized knowledge, it does not follow that all sciences are restricted to the use of the same method. Methods may vary. The methods of social science may differ from those of physical science, and yet its claim to be scientific need not in the least on that account be impaired. Nor do I deny that there are social uniformities. I merely dissent from the assertion that these uniformities should or can, without serious mischief resulting, be called *laws*. I say, without serious mischief resulting, and this for a twofold reason. First, because already there are at least two, possibly three distinct significations which the word "law" connotes, the legal signification, the moral signification, and the physical signification. If the uniformities which we discern in social conduct are admitted to differ from the uniformities contemplated by physical science, by jurisprudence, or by ethics, then we shall connect with the same term a fourth connotation, and the multiplic-

ity of connotations will tend to confusion. If, on the other hand, we assimilate the social uniformities to physical laws, then we shall create the impression of the inevitable dominance of these uniformities over the human will, an impression which is in the highest degree prejudicial to social betterment. That such an impression has already been created by the use of the term "law" in the field of economics is matter of common knowledge. Shall we extend the mischief to other departments of conduct, or can we hope to avert it by surrounding the term "law" as applied in social science, with qualifications which are sure to be ignored?

The capital question is this: Whether the social uniformities are of the same kind as those uniformities which we designate as physical laws? If they are, let the same term be applied to both. If they are not, let the difference in the designations used indicate and emphasize the difference in the things designated. Let us in that case speak of social uniformities and not of social laws.

Is there such a difference in kind, and what is it? I can here only shortly outline my position, without attempting to elaborate it in detail or to defend it against adverse criticisms that may be brought to bear against it. Physical law is the expression of a fixed relation between antecedent phenomena as cause and sequent phenomena as effect. A social uniformity, on the other hand, is the expression of a relation between ends and means. All human conduct is directed toward the attainment of ends. All the uniformities of human conduct depend on the average fitness of certain means to make for the achievement of certain ends. The point of view from which Nature operates, if a metaphor be allowed, is causal. The point of view from which man acts is teleological. Nature is governed by forces. Man is determined by ideas. The difference is vital.

Again, physical law implies not only a fixed relation between phenomena, but also involves that these phenomena, together with the fixed relation between them, are of constant occurrence. A physical law which should be true only under transient conditions, that is, under conditions which fail to repeat themselves, is inconceivable. Physical truth is true *semper et ubique*. Undoubtedly this account holds good only of ideal physical law and does not perfectly apply to any of the physical laws which are formulated in the text-books. As Professor Sidgwick has it: "We assume the existence of natural laws, and the narrowing down of these into exactitude is the endless problem of discovery." An endless problem, indeed, a goal to which we only approximate asymptotically. A remnant of inexactitude remains unexpunged even in the most certain of natural laws. But the cause of the inexactitude is not any wavering or flickering in Nature's process, but is due to our subjective uncertainty whether we adequately apprehend the process as it actually goes on.

Nature is a pedant. Nature does not alter her habits. Nature always repeats herself. Not only is it true that, the same conditions being given, the same effects will always follow; not only is there this constancy of relation, but it is likewise true that the same conditions will repeat themselves, or conditions sufficiently similar to exhibit the constancy of relation. Indeed, when we speak of the physical order, we are speaking of an abstraction, of one side of things, to which our attention is restricted for the time, namely, of that side of things which is characterized by just this constancy both of relation and of recurrence. But in the case of the social uniformities, while there is an approximate stability of relations between sets of phenomena, there is no such constancy in the repetition of the phenomena. Physical nature is a pedant, human nature is a Proteus. In the case of physical nature the object studied may be compared, let us say, to a building, which for some reason we are not permitted to approach closely, the various features of which are foreshortened now in one way, now in another, according to our point of view. The object itself does not change its shape. Could we come near enough, we should be able to report it with perfect exactitude. But in the case of society, the object is not only remote from our apprehension, despite its apparent nearness, but in addition it changes its shape while we are engaged in the act of contemplating it. It is in this way that I should reply to the argument of those who hold that the law of gravitation also is but an incomplete transcript of Nature's process, and that the inexactitude which is put forward as an objection to the use of the word "law" for social uniformity would equally apply to natural law. In the one case the inexactitude is in the apprehension of that which is fixed and stable, of that which, by reason of its stability, permits of a considerable approximation to exactitude of description. In the other case the inexactitude is due both to the complexity of the object studied and to the unpredictable changes which take place in it. These changes, let me now again remind you, arise from the fact that uniformities of conduct are adaptations of means to ends, and that these ends are ideas, and, therefore, that the uniformity lasts only so long as the idea lasts or is dominant. But one dominant idea may be displaced by a different one, as happened at the time when the Germanic peoples were converted to Roman Christianity. And when a new idea becomes dominant, the order of the motives that govern conduct is revolutionized, the old ideas, to the extent that they still remain operative, entering into new combinations, and the whole complex of conduct, in consequence, being altered. If, indeed, it could be shown, as has been attempted, that there is not only uniformity as between ideas and the mode of realizing them in a given society, but also a uniform pro-



gression from one dominant idea to another, the conception of social law might still be justified. But the attempts to prove such a regular law of transition are futile. The passage, for instance, from polytheism to the higher forms of religion does not indicate the working of any uniform principle of development, but has actually been achieved along the most divergent lines. In one case the next step after polytheism was intellectual monotheism or the monotheism that reflects the idea of intellectual unity, as among the Greeks; in another case it was the monotheism that reflects the idea of power, as among the followers of Mohammed; among the Hebrews it was the monotheism that corresponds to the idea of supreme righteousness. In other cases polytheism has passed over into pantheism, as among the Brahmans; and in still another into intellectual nihilism, as among the Buddhists. Race characteristics enter in largely to determine the course of development; and these in their nature, their development, and their influence are quite incalculable. The influence of great men, or of what from the standpoint of onlookers must be called the accident of genius, despite much that has been said to the contrary, likewise enters in as a determining force; and genius in its derivation and its possible effects, is incalculable. And I should be untrue to my inmost conviction if I did not add that the idea of moral freedom also enters in; and this, too, in the extent of the influence which it may acquire, is unpredictable. The conclusion, therefore, to which I am led is that social science is concerned with uniformities and not with laws; that these uniformities differ from physical laws not only in degree but in kind; and hence, that in the nature of the case there can be no such thing as a law of social development, and that it is not only useless, but in principle a mistake, to look to social science for the formulation of those ideals which are to shape the future evolution of human society.

But if social science cannot furnish ethical ideals, are we to infer that the time spent in it is a waste of effort, and, more particularly, that its help in the task of social improvement can be dispensed with? I most emphatically avow my conviction that the contrary is the case, that the help of social science is indispensable, that it has already rendered invaluable services to human progress, and that it will render still greater services in proportion as it exploits its opportunities within its own limits, instead of seeking to transcend those limits. For a moment let me attract your attention to some of the most signal benefits which we have received and may further expect at its hands. Social science has taught us the great and useful lesson that all institutions, even those that seemed most stable, have changed, and hence that they are liable to further change. It has thus lightened the yoke of custom, made us ashamed of our mental and moral provincialisms, and dissipated the false glamour that often



attaches to vested rights and vested interests. It has created a psychical disposition favorable to the idea of progress. At the same time, by disclosing the slow and gradual nature of all beneficent changes, it has impressed the necessity of caution and patience in the attempt to promote progress.

Social science has largely contributed to what may be called collective self-knowledge, and self-knowledge is as much a necessary precedent condition of improvement in the case of society as in the case of individuals. It has traced helpful if not perfect analogies between individual development and certain stages in the past development of the human race, and has also shown the survival of the more primitive types of civilization in certain strata of contemporary society. It is thus calculated to throw some light on the causes that bring about the conflict of ethical standards in modern societies, and to furnish us with hints as to the method by which the conflict may be diminished. It further contributes to social self-knowledge by such investigations as the study of the psychology of crowds, and it can make additional and important contributions in the same direction by careful descriptions of the chief types of human temperament and of race character, as objectified in literature, art, law, religion, etc.

Social science creates a disposition favorable to patient progress; it contributes to social self-knowledge. It also assists in the practical work of human betterment by giving definite expression, in its statistical averages, to the connection between great social evils and the conditions external and internal (the two can never be wholly separated) to which they are due, thereby greatly enhancing the social impulse to remove such evils. The connection between death-rate and social class, between intemperance and irregularity of employment, are examples in point.

Finally, the social end being given, the ethical formula being supplied from elsewhere, social science has its most important function to discharge in filling in the formula with a richer content, and, by a more comprehensive survey and study of the means that lead to the end, to give to the ethical imperatives a concreteness and definiteness of meaning which otherwise they could not possess. Thus ethical rule may enjoin upon us to promote the health of our fellow men, but so long as the laws of hygiene remain unknown or ignored, the practical rules which we are to adopt in reference to health will be scanty and ineffectual. The new knowledge of hygiene which social science supplies will enrich our moral code in this particular. Certain things which we freely did before, we now know we may not do; certain things which we omitted to do, we now know we ought to do. If a connection between intemperance and irregularity of employment is traced, in this particular too, the

moral code will be enlarged. We shall now know at least that it is our moral duty to unite our efforts with those of others in order to remove the social danger of irregular employment. Similarly in the finer instance of the duties of sexes to one another, in the duty of parents to the child, of the citizen to the state, etc., a new knowledge of the means that conduce to the moral end will enlarge, will diversify, and will enhance the stringency of the moral code. Surely this is a wide and noble field. Surely it is worthy of the devotion and enthusiasm of the social scientist, and offers ample opportunities for the exercise of his highest faculties, both as a scientist and as a man.

I have now reached the end of my argument, and here might fitly close this paper. But one question I know will linger in the minds of many who may have followed me thus far. Whence then, if not from social science, or sociology, are the sovereign ethical ideals to be derived? Who is to determine for us what the social end ought to be? Is the hope of unanimity with regard to the ethical standard to be relinquished? Is there no prospect of relieving our highest moral aspirations from the taint of subjectivity which adheres to them? My answer would be that the diversity of ethical standards is unavoidable, and is not the unmixed evil it is often represented to be. Ethical principles are not propagated by being stated as intellectual abstractions, but by means of the conduct to which they lead. "By their fruits they are known." Such formulas as the categorical imperative of Kant, or even the equation between our neighbors and ourselves, established in the Golden Rule are not convincing except they be translated and envisaged in the life which is led according to them. 'T is the life that converts. The differences in ethical standards are due to differences in degree of development and in temperament. The higher standards will overcome the lower by the convincing force of example. Our trust must be in the moral endowment that is latent in all men; the appeal must be to human nature in the last instance. But the process of change must in the nature of the case be gradual, and it is well that it should be so, since those who are morally advanced, or believe themselves to be, are thus put on their mettle to propagate the moral truth they hold dear, by putting the emphasis of their efforts upon the life, upon the side of feeling and will, rather than to seek the moral improvement of mankind by means of such intellectual unanimity as might be worked out in sociological laboratories. Furthermore, the prospect even of intellectual agreement among those who are upon the same moral plane would be greatly enhanced if only the independence of ethical science from other branches of human knowledge and interest could be secured. Ethics has been treated in the past as a mere handmaid of religion; at present, notably by the sociologists, it is treated as a mere branch of natural science.

There are intimate connections between it and religion, and relations also between it and physical science. But every branch of human investigation is handicapped so long as it is treated as ancillary to others, and true progress in any field of investigation begins only at the moment when the field is provisionally isolated from the rest. Let the isolation come first, and the connections and relations be sought afterwards; this is at present the great desideratum of the subject of which I speak.

Ethics is the science of moral judgments. Its office is to examine, to reflect upon, to search out the first principle, the fundamental formula that underlies these moral judgments. The chief moral judgments which it is called to examine, if I may here, in passing, express my own standpoint, are: First, the general judgment that there is such a thing as rightness and wrongness in conduct; and then, that rightness in conduct is constituted by the *joint pursuit* of the individual and the social end, of the end of the self and of the end of the other selves socially related to it. Wanted: a formula which shall satisfactorily express this junction of ends in the same act, which shall, if adopted, inspire society to make the end of the individual its end, and the individual to make the end of society his end. Does the egoistic formula correspond to this requirement? Does altruism, with its tendency to sacrifice the individual to society, correspond to it? It ought to be possible, if the problem is thus isolated, to make progress toward a successful solution. The test of success would be that the formula when found can be shown to subsume under itself the moral judgments accepted as valid in society to-day, and can also be used creatively to work out new moral judgments answering to the needs of society as at present constituted, and convincing when translated into action.

But in thus stating my conception of the scope and function of ethics I have transcended the scope of the topic I had set myself, namely, to raise, and, according to my ability, to answer the question whether the particular social sciences, or sociology in general, can furnish ethical imperatives; to set forth what social science cannot accomplish — not only has not, but in the nature of the case cannot; and on the other hand, to estimate justly its past achievements and the worth of what it may be hoped to achieve in the future.

In closing, I should like to leave this point with you for consideration: that as a matter of fact the greatest advances in the ethical progress of mankind have been achieved not by those who were more learned than others in the social science of their day, but by those whose inner life was profound, who searched the depths of their own experience, who were stirred and humbled by the discrepancy which appeared between the ideal of what they conceived ought to be and actual conditions, and whose efforts were directed by the desire in

some measure to overcome that discrepancy. Such was the case in the past, and such, I may be permitted to say, I expect will be the case in the future. The social scientist will help to enrich, refine, and specify the contents of the moral code; but because the nature of the individual is social, he who interrogates his own consciousness with a view to reaching the deepest springs latent in it will best help us to bring into view and to describe the social end.

## SOCIAL TENDENCIES OF THE INDUSTRIAL REVOLUTION

BY GRAHAM TAYLOR

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THE industrial revolution, during the initial stage of which the nineteenth century dawned, dates and characterizes our contemporary conditions and order of life. The political revolutions of the eighteenth century were the expiring struggles of the dissolving feudal solidarity rather than the travail attending the birth of the present age.

The individualism which intervened between the medievalism ending with the French Revolution and the modern industrial era inaugurated by the introduction of machinery and the factory system is proving to be more transitional than persistent. Its phenomenal achievements and forceful individuals are exceptional enough to claim an age of their own. But they were destined to fulfill the higher function of preparing a way for, and making possible the still farther-reaching development which is only now evolving its form and order. The social disintegration intervening between these most distinct eras allowed, if it did not compel, the evolution of the individual as the new unit of society. No sooner had the type of this individualized unit been fairly and firmly set than the process of reintegration set in. The forces resident in or centred about machine production and the subdivision of labor began to assert their superiority to the domination of the individual who created and, until recently, controlled them. This reintegration of social units, more independent than had ever existed before or can ever exist on the same scale again while present tendencies last, is the phenomenon that distinguishes the close of the nineteenth and the opening of the twentieth century.

The tendency of these times in all spheres of life has been from individual independence to the interdependence of man upon man, craft upon craft, class upon class, nation upon nation; from unrestricted competition to a combination of capital and labor as inevitable and involuntary as the pull of the force of gravity; from the personal maintenance of the freedom of contract to the only possible exercise of that right among increasing multitudes by collective bargaining; from local autonomy and state rights to national consolidations; from racial populations to a cosmopolitan, composite



citizenship. That is, the irresistible ground-swell and tidal movement of the present quarter-century has been away from individualism toward a new solidarity. While the individual instead of the kindred group is its primary constituent unit, yet, as has been none too strikingly said, we are "struggling with this preposterous initial fact of the individual, — the only possible social unit and no longer a thinkable possibility, the only real presence and never present." But the synthesis of these elusive factors of the social problem, never more contradictory than now, was seen to be fundamentally inherent in human nature in the vision of a poet, who long antedated our era, and sang of it thus:

"Man is all symmetry, full of proportions,  
One limb with another,  
And all to all the world beside.  
Each part may call the farthest brother,  
For head with foot hath private amity  
And both with moons and tides."

These tendencies of the times have dominated more and more those of the groups of individuals and interests under review in this department, with the outline sketch of whose trend I am charged.

They have been most determinative, of course, in the industrial group. The freedom of contract, conceded to be the inalienable right of the individual, is no longer protected or effectively guaranteed by the law alone. Combination on either side controls the market and leaves the unorganized individual to accept what is offered with no alternative. To bargain freely with combined capital, the individual laborer has found it an economic necessity to organize his craft, even at the expense of abridging his personal liberty. The collective trade agreement, on one or both sides, is inevitably superseding the individual contract in the labor market. The form of organization developed by labor to meet this requirement left the individual employer or corporation as helplessly at the dictation of the united employees as ever the laborer has found himself at the mercy of his employer in dealing single-handed and alone with organized capital. Employers' associations became as much of an economic necessity as labor-unions. Both are organized on essentially the same basis of an instinctive class-conscious impulse for self-preservation. Each obliges the other to conform the type and tactics of its organization to virtually the same model. Swiftly and inevitably both constituents in the industrial group are adjusting their business methods and relationships to these inexorable conditions of modern industry.

Beneath all the overlying turmoil and friction, injustice and menace, attending this rapid and radical readjustment, there is to be clearly discerned the evolution of a larger liberty, at least for the

class, a rising standard of living for the mass, a stronger defense against the aggression of one class upon another, and a firmer basis and more authoritative power to make and maintain peaceful and permanent settlements of industrial differences. More slowly and yet surely there are developing legal forms and sanctions, which not only make for justice and peace between the parties of the first and second parts, but for the recognition of the rights and the final authority of that third and greatest party to every industrial interest and difference — the public.

Urban conditions most persistently deteriorated under the most persistent neglect through the whole period of the abnormal growth and complexity of city populations attending the establishment of the factory system. But they have fairly begun to show the hopeful and widespread indications of reorganization, of a constructive policy, and of a more democratic intelligence, interest, and control. Most conspicuous of the movements for civic betterment and fundamental to the success of all others is the rescue of municipal administration from partisan political control. The seizure of the balance of power between parties by voters who thus declare their independence of the national issues in municipal action, has proved to be the only hope of emancipating urban life from the exploitation for party spoils.

In Great Britain it has broken new lines of cleavage upon which the citizens divide on local issues according to their predilections and ideals. The marvelous rise of civic enterprise and administration out of the degraded corruption in which English cities were sunk prior to the middle of the last century is largely due to exchanging the names and issues of "Tories" and "Liberals" for those of "Moderates" and "Progressives" in policies and politics. In this country the redemption of our second largest city from the most avowedly debased control of thoroughly commercialized partisan politics is the most marked achievement in the American municipal reform movement that is destined to set the type of method by which only other cities are likely to attain their freedom and progress. Chicago's Municipal Voters' League has proved to be the simplest and most effective organization of independent citizens for the information, coöperation, and perpetuation of an electorate loyal to civic patriotism as well as for the restraint and purification of the management of political parties in cities.

More efficient departmental administration quickly follows every real gain in political regeneration. Such improvement in housing conditions as promises well-nigh to abolish the slums in Glasgow, Liverpool, and London; hygienic development of bathing-beaches, bath-houses, and gymnasiums by the city of Boston; the inspection, licensing, and regulation of manufacturing in New York City

tenement-houses, which may yet restore the home to the family from the usurpations of trade; the almost unobserved, yet marvelous development of the South Park system in Chicago, with its playgrounds and rooms, its outdoor and indoor swimming-pools and gymnasiums, and its park houses for neighborhood social centres; the steady rise of a more scientific official and semi-official literature reporting civic conditions and the ways of bettering them, such as have been issued by the London County Council and the first commissioner of the New York City Tenement-House Department, — these public achievements, prompted or assisted by such voluntary associated efforts as local improvement societies and social settlements, are making possible the collective ownership and operation of municipal enterprises to supplement or supersede inadequate private initiative or management.

Thus may be fulfilled the ideal of the "ancient city" which has never been realized in fact, namely, a federation of families for the uplift and unification of the common life, formed under the sanction of a fundamentally religious faith in each other and in the obligations and privileges of the brotherhood of all men.

Scarcely less pronounced, if of more gradual growth, are the changes which are transforming the conditions of rural life. The interurban electric railways for freight and passengers, the telephone and rural mail service, the better roadways for bicycles and automobiles, the traveling libraries and permanent centres for educational and social interchange, are rapidly relieving the monotony of country life, lightening some of its drudgery, furthering better educational privileges by the union of school districts, making accessible the high school, college, and university centres, bringing farmers' institutes and academic associations of economists together for joint sessions, developing the extension work of agricultural colleges, rallying the grange movement, — all these things combine to hold out the first hope which has dawned upon the tendency to the excessive density of the urban population, and that promises a redistribution of the people which will make possible more normal life both in country and town.

The family has suffered an invasion of its community of interests from many directions. The unity of its kinship has been attenuated by the prevailing influence of excessive individualism, from which none of its relationships have wholly escaped. Among the disintegrating forces directly and powerfully brought to bear against it throughout this industrial age, the first to be reckoned with is the changed economic status of women. Although the woman has always done her full share, if not more, of the world's work, upon which the family has depended for its existence and well-being, it has been hitherto for the most part done at the heart of the home and the

centre of the family circle. The domestic system of industry, however, was never ideal, and one of the way-marks of modern industrial progress is undoubtedly to be noted in the separation of the shop from the house and the restoration of the home to the family. But the family has never been subjected to such a strain as by the increasing industrial necessity for the wife and mother to do so much of her work out of the house and away from her home and children. The growing economic independence of women may partially compensate for this loss to individual homes by benefiting the institution of marriage in general. The abject dependence of so large a proportion of women upon marriage for their livelihood did not previously tend to purify the marital relation or put the wife in her rightful place on an equality with her husband in the family circle. Capacity for economic independence cannot fail to admit both the man and the woman to the marriage contract on more equal terms and establish the status which it involves upon a freer and more ingenuous basis.

But great as is the gain of this more just and moral economic independence of woman, it is attended with serious disadvantages, not necessarily inherent in it, yet closely involved with it. The dependence of the family upon it for support is at a fearful cost to childhood and home life, and in a large proportion of cases undermines the self-respect and dependableness of the husband. Those forms or methods of industrialism which have ignored the humanities of sex and age stand at the judgment-seat of the medical profession, the school-teacher's experience, the government's statistics, and all child-labor legislation, convicted of deteriorating the very stock of the race.

Wholesale emigration is for one or two generations a more serious crisis in family life than is generally known. Especially among the less assimilable races, and where a primitive peasant folk are precipitated into the heart of the great and terrible city wilderness, the effect is well-nigh destructive not only to family relationships, but to individual character. The man who was seldom or never away from home in the old country must wander far and wide in search of work or stay away for months to keep it. The woman, if not overworked in industry, is idle as never before in the crowded tenement-house. The children, without knowledge or confidence in the ways of the new world to compensate for the loss of their restraint and familiarity in the old home-land, disobey their parents before learning self-control, have too little schooling before they begin work, and too fragmentary employment to give them the discipline of the shop or the acquisition of a trade. Thus among the many immigrant families who strike root and bear the best fruitage grown on American soil at least, there are not a few who, despite the best intent,



become the most dangerous sources of pauperism and crime, as do not a few native families removing from country to city.

The precariousness of livelihood and the enforced mobility of labor are also a resistless undertow which undermines and sweeps away the very foundation of family life. It is the occasion of much of the desertion and divorce which so seriously menace the marriage relation.

Bad housing conditions are so seriously inimical to the very existence of a family worthy of the name that, in self-defense as well as for humanity's sake, great municipalities, like those of Glasgow and Liverpool, are amply justified in providing workingmen's dwellings for lowest paid laborers, reserving whole blocks of them for widows with their children, and erecting lodging-houses for widowers, with special nursery and kindergarten provisions for their motherless little ones.

The way in which family unity is ruthlessly disrupted by sectarian rivalry, the order of home life disregarded by stated public appointments, the separate recreations provided for men and women, younger and older apart, while little or nothing is offered the family group which all its members can enjoy together,—these and many other tendencies of the age denote the family to be the greatest ignored factor of modern life.

But most promptly and hopefully does it respond to the better conditions for its maintenance and development as they supersede the worst at all these points of resistance.

The tendency thus affecting the groups already considered by virtue of that fact have very direct bearings upon dependency and delinquency. The type and ratio of both are modified and intensified by the conformity of increasing multitudes to these molds of character and conditions of life. The legal and philanthropic measures dealing with them are equally conditioned by the same causes.

While, for instance, the tramping of farmer families is noted by Sir Thomas More, when sheep ranches first displaced agriculture in England; while landless serfs followed in the wake of the Black Death, yet the modern "tramp" is a distinct species and the exclusive product of our industrial age. He is a terminal of a tendency which gradually evolved him, not indeed without a certain inclination of his own, but far more, in most cases, by reason of forces for which society was more responsible than he, though almost as powerless as he to control them. Intermittent work in shorter runs and longer hours; intervening idleness and going afield for a job; temporary employment on the Dakota wheat-fields or some remote railway extension; discharge at a point too distant, measured by dollars, to get back home without "taking to the road" or "beating his



way,"—such are some of the short cuts from an industrious life to a career of vagrancy or crime.

The labor colonies of Germany, the municipal lodging-houses of England and America, with state employment bureaus and the necessity to make work, now and then, here and there, to keep the army of the unemployed from starving,—these surely are signs of the new times.

At no point is legislation gaining at so good a pace upon the wasteful abuses of industrialism as in the provision for compulsory education, the strict regulation of child labor, the maintenance of juvenile courts and probation officers to deal with delinquent and dependent children and in furthering and safeguarding the placing out of those who are wards of the state.

The tendencies to specialize, combine, and democratize the public and private administration of charities and correction are as characteristic of the industrial age as any of its developments. Indeed, the whole modern conception, method, and movement of philanthropy are hardly conceivable prior to or apart from our present point of view. But only within the last few years has this conformity to those economies and concentrations which are distinctive of industrialism been so marked. At no previous time has the socially well-informed person been expected to know, not something of everything, but everything of something. Specialties have narrowed down and also broadened so that it is more possible to meet this requirement, and yet in so doing find scope for the best academic discipline and culture. Every branch of philanthropy has long since shown the practical value in this specializing accuracy of observation and administration. Never before have more people of strong caliber and large personal equipment been in the social service, professionally and as volunteers. Teachers trained for professorships find satisfaction and reputation as superintendents of reformatories. Men of recognized talent and attainment, both in scholarly and business pursuits, are found in the wardenships of prisons, at the head of child-saving institutions, serving as chiefs of departments in city governments and in secretaryships of state boards of charities. Their service as well as their literature is receiving deserved, though belated, academic recognition as of scientific value. Their specialties are taking rightful place among the arts.

The economy of personal and financial resource in combining the same and allied interests results in the largest output for the least expenditure in philanthropy as in business. The charity organization society has become as much of an economic necessity and as essential a part of the equipment of cities and towns as the clearing-house of the banks.

But this and such kindred developments as state boards of charities, state charities aid societies, and state and national conferences of charities and correction are not more expressive of an economic instinct than of a democratic spirit. Indeed, all these more representative associations arose coincident with and to meet the demands of the people's assumption of the control of their own affairs. Local autonomy in a district became coördinate yet coöperative with the centralizing yet exclusive headquarters which formerly claimed the whole field. Paid official positions became all the more indispensable and honorable when under the supervision of the unpaid representatives of the public. The salaried expert was recognized to be all the more a leader when there were volunteer workers and friendly visitors to be led. The few and select donors of large gifts, who not without reason have sometimes been suspected of monopolizing the "Lady Bountiful" type of benevolence, have found neither their legitimate influence nor the scope of their giving curtailed by sharing the democratic spirit which now supersedes whatever exclusiveness there used to be in philanthropy.

Moreover this spirit has begun to save the loss of individuality suffered by those in the dependent and delinquent groups who have been massed impersonally and indiscriminately together, under the congregate system of institutional administration. The reversion to the more normal type of individual life in smaller family or household groups is the belated recognition of the democratic right of each to personal consideration, which all are bound to respect in the care of the dependent, the defective, and the delinquent. In respecting this right the community equally regards its own welfare by taking the most direct means of restoring to self-help and rightful place among men those whose capacity for self-control and usefulness is weakened, if not destroyed, by treatment, not less a violation of nature than it is inimical to public interests. In line with the same farther-sighted humanitarian economy is the enlistment of whole populations, through their city governments, to grapple with their social situation as a whole. The Elberfeld policy toward dependency; the public control of the liquor traffic as in Scandinavia; the marshaling of the legislative authority, resources of taxation, and a constructive civic programme for the abolition of slums and the equalizing of privileges and opportunity, as the borough and county councils of England are doing it; the regulation of industrial forces in the interests of the whole people, as in Australia and New Zealand,—such attempts to reach a saner social order and realize a more human ideal of collective life are impressive way-marks of progress such as only the whole community can achieve for itself.

The personal and community interests we have been considering are so permeated by the ideals and influence of the religious group

that our review would be conspicuously deficient if we did not note its tendencies in the same direction. Slowly but surely the religious social consciousness is dawning again. Its appearance, now as before is identified with the world view and movement of the churches. Its social and even industrial expression has already begun to be worthily chronicled from original sources with scientific spirit and historical perspective, notably in Dennis's three massive volumes bearing the significant title *Christian Missions and Social Progress*. This first work of its kind deserves to be classed with Ulhorn's *Charity in the Primitive Church*, Schmidt's *Social Results of Early Christianity*, and Brace's *Gesta Christi*. The exigencies of missionary work on foreign fields, which is represented by this author, has not allowed the dualistic separation of religion from life, and has necessitated a closer identification of the common faith with the domestic, industrial, and community interests of the common life. Especially marked is this in some of the exceptionally successful work among the subject races and abject classes. No more expert work has been done by government or under scientific educational auspices than in some Christian missions and schools among the islanders of the Pacific, the negroes of Zululand, and in the American black belt by the American Missionary Association and under Booker T. Washington at Tuskegee, with the Indians at Hampton and Carlisle and on some of the reservations.

The conditions of life especially in the cities of Christendom are developing church agencies, which still far from adequate to meet the religious situation or the ethical need, promise much development. Typical among them are the Inner Mission and also Naumann's social propaganda in Germany; Christian social movements in the Established and Free Churches of England and the adult schools of the English Friends; the Young Men's and Young Women's Christian Associations, with their physical, educational, railway, and shop departments and equipment; the institutional type of church work, especially that of the Protestant Episcopal Church in New York and the Wesleyans in London; and the re-awakening among the sodalities and institutions of the American Roman Catholic Church to contemporary needs and methods.

These church activities are already having their formative influence upon the worship, thought, and legislation of ecclesiastical bodies. Hymns of social feeling and ideal are finding their place in authorized collections, hitherto almost exclusively individualistic. Christian ethics and even dogmatic theologies are placing new emphasis upon their bearings on the collective life. The polity of every church is becoming more democratic. The religious sentiment is being humanized. And last, and we fear least, but ultimately most inevitable of all the movements within religious bodies, is to be noted the

pressure, chiefly exerted from without, toward federating with each other for purposes of defense and coöperative effort, though not for the organic unity of government, creed, or ritual. The most conspicuously valuable results yet attained in this direction are recorded in the sociological census taken by the Federation of Churches and Christian Workers of the City of New York.

We have yet to trace the reciprocal influence of the social tendencies of this industrial age and contemporary educational movements upon each other.

About the middle of the last century the need of a new nomenclature to designate these new movements of thought and action began to be met. In 1830 Auguste Comte coined the term "sociology" to include the group of sciences which he designated "Social Physics." Very slowly, however, is the terminology thus initiated finding its way into anything like accepted usage. The first title-page in American periodical literature bearing a sociological term and scope is that of Simon Stern's *Social Science Review* which appeared in 1865. It discovered its *raison d'être* in the Civil War, which it predicted "will probably produce many changes in our social and political institutions" so that "it has become of the utmost importance that we should at this period, more especially, render ourselves familiar with the natural laws which govern mankind in its social state, and that public opinion and legislation may be in accordance with and not in contravention of those natural laws." But the prospectus was so far removed from any scientific definition as to construct out of the single term sociology a veritable omnibus, into which, with our all too familiar tendency to overcrowding, it packed about all the political, economic, domestic, and moral issues then before the American people.

The new point of view required a reinvestigation and reclassification of the old and additional phenomena attending the tendency to such a gregarious, yet segregated life, such a subdivided and interdependent labor as the world had never known before. In the tables of his *Descriptive Sociology*, Herbert Spencer suggested, if he did not determine, a scientific classification of at least historical and literary data, which stimulated research and encouraged the application of the inductive method.

It was not until twenty years ago that any attempt to be compared with it was made to classify and summarize contemporary data. All England was then startled by the "Bitter cry of outcast London," which was piteously but sternly raised by some Christian mission workers in the then all too little known East End. Amidst the clamor of protesting or appealing voices over the mute sufferings of poverty-stricken thousands and the growing discontent at the neglect of such conditions, one man went silently to work to get at



the root of the problem. He stood almost alone in his insistent and persistent self-exaction to ascertain accurately the facts of the actual situation. The opening years of the twentieth century have registered no greater achievement than the completion of Mr. Charles Booth's *Life and Labor in London* at the close of the nineteenth. The worth of this work, not only to London, but to all the cities of the world, can scarcely be overestimated.<sup>1</sup> It supplies a practical classification and method which by a consensus of opinion are already widely recognized and used. Its conclusions are models of tested accuracy, cautious conservatism, and the fearless facing of ascertained facts. Its permanent reference value is assured by well-nigh perfect tabulations, abstract of contents, and full indices. Already the type of scientific investigation set by this colossal work of London's great shipper is reproducing itself in books of other thoroughly original investigators which deserve to be classed with it. It is a pleasure thus to rate Mr. B. Seeböhm Rowntree's *Poverty: a Study of Town Life in York*; the report on the housing conditions of Manchester by Mr. T. M. Marr; and the *London Daily News's* investigation of *Religious Life in London*, edited by Mr. R. Mudie-Smith.

The endowment and equipment of the "Musée Sociale," in Paris furnishes and suggests a provision for perpetuating such efforts, preserving their data, and publishing their results, which is sure to create similar centres for archive and research with far too little resource, and, therefore, on a less exhaustive scale, the Institute of Social Service in New York is gathering a valuable collection of clippings, pamphlets, photographs, official reports, and books bearing particularly upon the welfare work of industrial establishments and municipal departments. The "Museum of Security" in Amsterdam by its permanent exhibition of appliances for protecting and saving life has established a centre of unique interest and far-reaching practical value. Great libraries, notably the Crerar Library in Chicago, have begun to specialize in these departments on a scale which promises to locate at several great centres not only exhaustive collections of their literature but also original data, which will open new sources to research.

The rise of university departments of sociology and social economics, so fully reported in the proceedings of the International Conference of Charities and Correction and Philanthropy held at Chicago in connection with the Columbian Exposition in 1893, has been followed by a steady and apparently permanent development, almost exclusively confined, however, to American institutions. The

<sup>1</sup> Its collaboration of the hitherto incoördinate facts of official inquiry, departmental reports, and government census, is even more valuable, in setting a standard of scientific exaction and method, than in its great direct results.



practical knowledge for living and working together has begun to be directly inculcated in the teaching of our technical and public schools.

The coöperative societies for social research, discussion, and publication have differentiated along the lines of their theoretical and practical specialties. While the Social Science Association continues to cover its very general field, the American Statistical Association, the American Economic Association, and the American Academy of Political and Social Science have added greatly to the expert *personnel* and equipment of their several departments of research. The recent organization in London and also in America of the "Sociological Society" for the study of social theory, and the "Institute of Social Service," suggested by and modeled after the practical purpose and methods of the society bearing the same name in New York, assures needed reinforcement at the great centres of observation and scientific resource in the Old World.

The most natural and timely sequels of these industrial and social movements are the schools which are arising at the greatest centres of activity to offer both general courses and technical training in the theory, history, and practice of what deserve to be called the social arts. The demand for trained helpers is being widely increased, not only by the growing opportunities and exactions of these manifold agencies, but also by the extension of the civil service law to cover positions in public, charitable, and reformatory institutions. But the offer of the supply of trained helpers is the surest way to create the demand for them where it does not exist.

One of the earliest initiatives in this direction was taken by Miss Helen Gladstone at the London Woman's University Settlement, in conducting a small training-class from year to year, the graduates of which immediately found positions of trust and usefulness throughout the kingdom. The Charity Organization Society of that city has recently brought about the coöperation of this class with the "School of Economics," some departments of the University of London, and its own expert force, to establish a "School of Sociology and Social Economics," which is in the second year of successful operation. In New York City a well-patronized summer school, conducted for several years by the Charity Organization Society, has evolved the "School of Philanthropy." In its very full curriculum, covering the whole academic year, it has the coöperation of the Columbia University faculty and the Association of Neighborhood Workers, both of which, independently, offer some courses of similar instruction. In Boston the study class of the Charity Organization Society has been the pioneer effort, which is now to be supplemented by the "Training-School for Social Workers," jointly conducted by Harvard University and Simmons College for Women.

"The Institute of Social Science" was opened at Chicago in 1903 by experts at the head of specialized agencies and institutions, both public and private, assisted by teachers identified with several universities. A four years' course has been established at the University of Chicago in the new Department of Religious and Social Science leading to an academic degree. At all these schools the great centres at which they are located are used as laboratories in which the students are assigned to carefully supervised and progressive field-work which constitutes a principal part of their training. The appointment of a standing committee on training for social work by the National Conference of Charities and Correction will greatly promote the progress, coöperation, and unity of these courses.

Perhaps more significant than all the tendencies of industrialism which we have noted is that which sets irresistibly toward international relationships. Beneath the sinister influence which commercial interests have had upon politics, there may be a larger good evolving. But the very elements which have been creating internal strife and provoking foreign wars may soon become so international in their proportions as to be the chief impediment to war and mainstay of the world's peace. Organized workingmen, who were the first to frighten the world by ignoring national boundaries, are, without the loss of their patriotism, naturally developing international unions out of their national organizations. These great craft brotherhoods, by stretching hearts and hands across seas to organize for their common interests across every frontier, bid fair, by their refusal to fight each other, to command the world's peace. Among the world's congresses convening at this Exposition, none registers a higher-water mark of human progress than the "Inter-parliamentary Union," with its three hundred delegates, representing practically all the constitutional governments of the world. The twelfth session of this union is immediately followed by the Thirteenth International Peace Conference at Boston, with a *personnel* and prestige which more than keeps pace with the progress of war.

With the possibility of this climax in sight, and in view of the profound changes in social condition which it has already wrought, the Industrial Revolution is making good its claim to be the most radical transformation through which civilization has ever passed.

## SECTION A — THE FAMILY



## SECTION A—THE FAMILY

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*(Hall 5, September 21, 10 a.m.)*

CHAIRMAN: PROFESSOR SAMUEL G. SMITH, University of Minnesota.  
SPEAKERS: PROFESSOR GEORGE E. HOWARD, University of Nebraska.  
DR. SAMUEL W. DIKE, Auburndale, Mass.

IN opening the proceedings of the Section of The Family the Chairman, Professor Samuel G. Smith, spoke as follows:

“The problem of the family may be studied from the speculative point of view as the primary form of human institutions, the germ from which all others have been developed. It may be noted that the form of the family has varied by climate, food-supply, economic and political conditions, and in short that every bond of each social group has been affected by similar forces, and that all institutions are formed practically on parallel lines.

“Polyandry calls for a sterile soil, and polygyny must not only have surplus bread-stuffs, but it is accompanied by despotisms. The industrial tribe will differ fundamentally from the military tribe in domestic institutions, but it will also differ in the character of its gods and in the forms of its worship.

“But the problem of the family may be viewed as a practical question of modern civilization. The loosening of family ties, the easy and frequent divorce, the lack of a sense of mutual responsibility among the members of the family group, may stir the spirit of the reformer, and may seem to him purely a moral question to be solved solely by the aid of moral forces. To him the question of the family is one of surpassing importance to the woman and to the child, and must be settled by improved legislation and by an aroused public opinion.

“These two points of view may, perhaps, not be so far apart as they at first appear. If the family be the primary social cell, then a historic study will show that the strength of the family indicates the strength of all other institutions. The permanence of a larger social group will depend upon the preservation of the cells of the social body. So the reformer will be reinforced by the study of society as a whole. On the other hand, such a study will doubtless lead him to inquire whether or not the condition of present instability of the family is a local social disease, or whether it may not be in fact only a symptom of general conditions. He will seek to be instructed by the effect of woman in labor, the influence of the decay of faith upon social ties, the effect of the sudden increase within the last generation or two of the world's wealth, and similar inquiries will throw light



upon his problem. If the weakening of the family comes from general causes, he will ask whether the causes seem to be temporary, and present conditions, therefore, of no great social importance. He will ask also whether his attack upon the evils he laments should be direct or indirect.

“We are fortunate in having for the leaders in the discussion to-day one gentleman who has made an important contribution to the history of the subject, and another gentleman who has contributed largely to the practical task of the preservation of the family. But we are doubly fortunate in the fact that both gentlemen are conversant with all sides of the subject.

## SOCIAL CONTROL AND THE FUNCTION OF THE FAMILY

BY GEORGE ELLIOTT HOWARD

[George Elliott Howard, Ph.D., Professor of Political Science and Sociology, University of Nebraska. b. Saratoga, New York, 1849; A.B. University of Nebraska, 1876; Ph.D. *ibid.* 1894; student of history and Roman Law, Universities of Munich and Paris, 1876-78. Professor of History, University of Nebraska, 1879-91; Professor of History and Head of History Department, Leland Stanford Jr. University, 1891-1901; Professor of History, Cornell University, summer term, 1902; Professorial Lecturer in History, University of Chicago, 1903-04; Professor of Institutional History, University of Nebraska, 1904-06. Member of American Historical Association; American Political Science Association; and American Sociological Society. Author of *Local Constitutional History of the United States* (1889); *Development of the King's Peace* (1891); *Modern English History and Biography*, in *New International Encyclopædia* (1902); *History of Matrimonial Institutions* (3 vols., 1904); *Preliminaries of the American Revolution* (1905).]

It is needful in the outset to mark the differentiation and to observe the close interrelations of the family, marriage, and the home. The problems of the family are necessarily involved in those of the home and marriage. The three forms of development are distinct in concept, but in their life or functions they constitute a trinity of interdependent institutions. Westermarck has suggested that in its origin marriage rested more on family than the family upon marriage. Biologically, of course, marriage comes first in the union of the sexes; yet it is certain that the culture-types of marriage have been determined less by the sex-motive than by the economic needs of the family,—the bread-and-butter problem in the struggle for existence. To-day this fact is decidedly true. In our age of social self-consciousness, of dynamic sociology, the reformer who would act wisely will not seek help in definitions but in a comprehension of the economic and spiritual needs of the family and those of the individuals which compose it. As in other cases, there must be an adjustment of functions to the environment. The social uses of the family and still more those of the home are too often neglected while speculating on the nature of wedlock and the ethics of divorce.

Accordingly the fundamental question which confronts the student of this trinity of institutions is the problem of social control. In the Western world the extension of the sphere of secular legislation practically to the whole province—the whole outward or legal province—of marriage is a fact of transcendent interest. In this regard the Reformation marks the beginning of a social revolution. Luther's *dictum* that "marriage is a worldly thing" contained within it the germ of more history than its author ever imagined. The real trend of evolution has not at all times been clearly seen or frankly admitted; but from the days of Luther, however concealed

in theological garb or forced under theological sanctions, however opposed by reactionary dogma, public opinion has more and more decidedly recognized the right of the temporal lawmaker in this field. In the seventeenth century the New England Puritan gave the state, in its assemblies and in its courts, complete jurisdiction in questions of marriage and divorce, to the entire exclusion of the ecclesiastical authority. For nearly three quarters of a century the clergy were forbidden to solemnize wedlock, while at the same time marriages were freely dissolved by the lay magistrate. Even the Council of Trent, by adjusting the dogma regarding the minister of the sacrament, had already left to Catholic states the way open for the civil regulation of matrimony, a way on which France did not hesitate to enter. Definitively the state seems to have gained control of matrimonial administration.

As a result in the United States, not less clearly than elsewhere in countries of Western civilization, marriage and the family are emerging as purely social institutions. Liberated in large measure from the cloud of medieval tradition, their problems are seen to be identical in kind with those which have everywhere concerned men and women from the infancy of the human race. Biologically they are indeed a necessary result of man's physical and psychic nature; but institutionally they are something more. Modern jurisprudence is a practical recognition of the fact that matrimonial forms and family types are the products of human experience, of human habits, and are, therefore, to be dealt with by society according to human needs.

The greatest fact in social history is the rise of the state; and in the more vital or organic sense the state has never been so great a social fact as at the present hour. Moreover its authority, its functions, are every day expanding. The popularization of sovereignty has but added to its power. With the rise of this mighty institution all lower organisms have lost something or all of their institutional character. In the culture-stage of civilization the gentile organization is no more. The clan and the tribe have disappeared. The function of the family as the social unit, as a corporation held together by the blood-tie, has likewise vanished. In a perfectly logical way, however paradoxical at first glance it may seem, the social function of the individual has expanded with that of the state. The process of socialization and the process of individualization are correlative and mutually sustaining operations.

Consequently out of the primary question of social control arises the problem with which we are here chiefly concerned: the problem of protecting the family against harm from the dual process of disintegration just referred to. Already many changes of vast sociological meaning have taken place, but the most vital char-

acteristic of the family survives. From the infancy of the human race, in the light of our fullest knowledge, monogamy appears as the prevailing type of sexual life. Under diverse conditions, religious, economic, or social, there have been many aberrations from that type; but, at first for biological or economic and later for ethical or spiritual reasons, always the tendency has been toward a more clearly differentiated form of the single pairing family. Among all peoples, whether Christian, Jew, or Gentile, the highest ideal of marriage is that of lifelong partnership.

On the other hand, under the twofold leveling process, the interrelations of the members of the family group are being gradually transformed. The patriarchal authority of the house-father is crumbling, although here and there it is still sustained by the relics of medieval tradition. The wife is declining to pass into the husband's hand, in *manu viri*, but physically and spiritually she is more and more insisting on becoming an equal member of the connubial partnership. Not only are sons and daughters legally emancipated at a reasonable age; but during nonage, in the most enlightened households, their individuality is being recognized in a way which would have shocked social sentiment a few generations ago. Young boys and even young girls show a tendency to cut the parental moorings and embark in affairs for themselves. The business precocity of the American youth is notorious. Moreover, the state in the interest of the larger social body is attacking the ancient constitution of the household. It is taking a hand in the rearing of the young. Through educational requirements, factory laws, and other child-saving devices it is invading the ancient domain of the parent. Little by little, to use the generalization of Dr. Commons, the original "coercive" powers of the family under the patriarchal régime have been "extracted" and appropriated by society. Thus the family becomes "less a coercive institution, where the children serve their parents, and more a spiritual and psychic association of parent and child based on persuasion." The state, the "peculiar coercive institution," he declares, in the interest of children's rights has "annexed" a large part of the *patria potestas*; and "all families are thereby toned up to a stronger emphasis on persuasion as the justification of their continuance."<sup>1</sup> In fact the leveling tendency just considered, instead of being a serious menace to the family, is probably a regenerative force. The question is, may the old legal patriarchal bonds be adequately replaced by spiritual ties, and thus a nobler type of domestic life be produced?

In more sinister ways the solidarity of the family appears to be menaced through the individualism fostered by our economic and

<sup>1</sup> Commons, "The Family," in his *Sociological View of Sovereignty*, *American Journal of Sociology*, v, 683 ff., 688-689.

industrial systems, operating chiefly in great urban centres. With the rise of corporate and associated industry comes a weakening of family ties. Through the division of labor the family "hearthstone" is fast becoming a mere temporary meeting-place of individual wage-earners. The congestion of the population in cities is forcing into being new and lower modes of life. The home is in peril. In the vast hives of Paris, London, or New York the families even of the relatively well-to-do have small opportunity to flourish — for self-culture and self-enjoyment. To the children of the slum the street is a perilous nursery. For them squalor, disease, and sordid vice have supplanted the traditional blessings of the family sanctuary.

Furthermore, the social trinity is seriously threatened by two opposite tendencies, each of which is, in part, the product of present urban and industrial conditions. On the one hand, marriage is shunned and the home is ceasing to be attractive. For very many club life has stronger allurements than the connubial partnership. For the poor, sometimes for the rich, the great city has many interests and many places more attractive than the home circle. The spirit of commercial greed and the love of selfish ease, not less than grinding penury, restrain men and women from wedlock. On the other hand, the urban environment has the opposite effect. In the crowded, heterogeneous, and shifting population of the great towns marriages are often lightly made and as lightly dissolved. Indeed, the remarkable mobility of the American people, the habit of frequent migration in search of employment, under the powerful incentives of industrial enterprise, gold-hunting, or other adventure, and under favor of the marvelously developed means of transportation, will account in no small degree for the laxity of matrimonial and family ties in the United States.

Yet these perils, although serious, need not become fatal. They are inherent mainly in industrial institutions which may be scientifically studied and intelligently brought into harmony with the requirements of the social order. The problems of the family are at once ethical, sociological, and economic. If the home is to be rescued from the encroachments of the shop and the factory, it must be earnestly studied in connection with the problems of organized industry and with those of state or municipal control of the great public utilities. Already through improved facilities for rapid transit the evils resulting from dense population are being somewhat ameliorated. Of a truth every penny's reduction in street-railway fares signifies to the family of small means a better chance for pure air, sound health, and a separate home in the suburbs. The dispersion of the city over a broader area at once cheapens and raises the standard of living. Every hour's reduction in the period



of daily toil potentially gives more leisure for building, adorning, and enjoying the home.

There is another result of social evolution which to many persons seems to be just cause of alarm. The liberation of woman in every one of its aspects profoundly involves the destiny of the family. It signifies in all the larger activities of life the relative individualization of one half of human kind. This means, of course, a weakening of the solidarity of the family group so far as its cohesion is dependent upon the remnants of ancient marital authority. Will the ultimate dissolution of the family, as sometimes predicted, thus become the price of equality and freedom? Or rather, is it not almost certain that in the more salubrious air of freedom and equality there is being evolved a higher type of the family, knit together by ties, sexual, moral, and spiritual, far more tenacious than those fostered by the régime of subjection?

In particular the fear that the higher education of woman, in connection with her growing economic independence, will prove harmful to society through her refusal of matrimony or maternity, appears to be without real foundation. It is true that the birth-rate is falling. So far as this depends upon male sensuality — a prevalent cause of sterility; upon selfish love of ease and luxury — of which men even more than women are guilty; or upon the disastrous influence of the extremes of wealth and poverty — of which women as well as men are the victims — it is a serious evil which may well cause us anxiety; but so far as it is the result of the desire for fewer but better-born children, for which, let us hope, the advancing culture of woman may in part be responsible, it is, in fact, a positive social good.

It is true also that, while fewer and fewer marriages in proportion to the population are taking place, men as well as women are marrying later and later in life. The marriage-rate is falling and the average age at which either sex marries is rising. Here, again, for the reasons just mentioned, the results are both good and bad. Certain it is that early marriages and excessive child-bearing have been the twin causes of much injury to the human race. It is high time definitively to expose the dual fallacy, derived mainly from ancient military and theological tradition, that early marriages and many children should be favored at all hazards. The gradual advance of the marriage-age may mean better mated parents and more stable families. Moreover, if it be admitted that a falling birth-rate is a sign of national decadence, it should be considered that an increasing population may now be sustained by families smaller than in earlier times. Better sanitation, the scientific mastery or prevention of disease, and the lessening of the ravages of war are producing a decrease in the death-rate which more than keeps pace with the fall in the rate of births.

In the last few decades the average length of human life has been considerably increased. Fewer children are born, but they are much better in quality.

There is really no need to be anxious about the destiny of the college woman. It is not marriage or maternity which she shuns; but she is refusing to become merely a child-bearing animal. It is simply wrong wedlock which she avoids. She has a higher ideal of matrimony. The rise of a more refined sentiment of love has become at once a check and an incentive to marriage. With greater economic and political liberty, she is declining to look upon marriage as her sole vocation. As a wife she asks to be admitted to an even partnership with the husband in the nurture of the family and in doing the world's work. Thus the liberation movement means in a high degree the socialization of one half of the human race.

It is perhaps not surprising that of all the alleged evils which threaten the integrity of the family divorce should be commonly looked upon as the most dangerous. In Europe as well as in America the divorce-rate is rising while the marriage-rate is falling. It is higher in the United States than in any other country collecting statistics except Japan. In this instance as in others it does not follow that the individualistic tendency is necessarily vicious. Nowhere in the field of social ethics, perhaps, is there more confusion of thought than in dealing with the divorce question. Divorce is not favored by any one for its own sake. Probably in every healthy society the ideal of right marriage is a lifelong union. But what if it is not right, if the marriage is a failure? Is there no relief? Here a sharp difference of opinion has arisen. Some persons look upon divorce as an evil in itself; others as a "remedy" for, or a "symptom" of, social disease. The one class regards it as a cause; the other as an effect. To the Roman Catholic and to those who believe with him divorce is a sin, the sanction of "successive polygamy," of "polygamy on the installment plan." At the other extreme are those who, like Milton and Humboldt, would allow marriage to be dissolved freely by mutual consent, or even at the desire of either spouse. According to the *prevailing* opinion, as expressed in modern legislation, civil divorce is the logical counterpart of civil marriage. The right of the state to dissolve wedlock is conceded, although it is clear that in marriage the family relation is more vital than the contract by which entrance into it is sanctioned. The rupture of that relation is indeed "revolutionary," as has been strongly insisted upon; but the state in granting divorce is merely declaring a revolution which in reality has already taken place.

Yet divorce is sanctioned by the state as an individual right, and there may be occasions when the exercise of that right becomes a social duty. Loose divorce laws may even invite crime. Never-

theless it is fallacious to represent the institution of divorce as in itself a menace to social morality. It is a result and not a cause; a remedy and not the disease. It is not immoral. On the contrary, it is quite probable that drastic, like negligent, legislation is sometimes immoral. It is not necessarily a virtue in a divorce law, as appears often to be assumed, to restrict the application of the remedy regardless of the sufferings of the social body. If it were, the only logical course would be to imitate South Carolina and prohibit divorce entirely. The most enlightened judgment of the age heartily approves of the policy of extending the legal causes so as to include offenses other than the one "scriptural" ground, as being equally destructive of connubial happiness and family well-being. Indeed, considering the needs of each particular society, the promotion of happiness is the only safe criterion to guide the lawmaker either in widening or narrowing the door of escape from the marriage bond.

The divorce movement is a portentous and almost universal incident of modern civilization. Doubtless it signifies underlying social evils, vast and perilous. Yet to the student of history it is perfectly clear that it is but a part of the mighty movement for social liberation which has been gaining in volume and strength ever since the Reformation. According to the sixteenth-century reformer, divorce is a "medicine" for the disease of marriage. It is so to-day in a sense more real than Smith or Bullinger ever dreamed of; for the principal fountain of divorce is bad matrimonial laws and bad marriages. Certain it is that one rises from a detailed study of American legislation with the conviction that, faulty as are our divorce laws, our marriage laws are far worse; while our apathy, our carelessness and levity regarding the safeguards of the matrimonial institution are well-nigh incredible. The centre of the dual problem of protecting and reforming the family is marriage and not divorce.

In fact there has been a great deal of hasty and misdirected criticism of American divorce legislation. Often it rests upon the facts as they were eighteen years ago, when the government report was compiled. Meantime great improvements have been made. Little by little the codes of the fifty-two states and territories, freed from their most glaring faults, are approximating to a common type. If American legislation is on the average more liberal than that of other lands, it would surely be rash to assume that it is worse on that account. The question is: Has American social liberalism, in this regard as in so many other respects, increased the sum of human happiness? Is there any good reason for believing that what De Tocqueville said fifty years ago is not to-day true? "Assuredly," he wrote, "America is the country in the world where the marriage-tie is most respected and where the highest and justest idea of conjugal happiness has been conceived."

The divorce movement in America is in part an incident of a great transition phase in social progress. It cannot be denied that the increase in the number of divorces is largely due to the new economic and intellectual position of woman. The wife more frequently than the husband is seeking in divorce a release from marital ills; for in her case it often involves an escape from sexual slavery. Indeed there is crying need of a higher ideal of the marriage relation. While bad legislation and a low standard of social ethics continue to throw recklessly wide the door which opens to wedlock, there must of necessity be a broad way out. How ignorantly, with what utter levity, are marriages often contracted; how many thousands of parents fail to give their children any serious warning against yielding to transient impulse in choosing a mate; how few have received any real training with respect to the duties and responsibilities of conjugal life? What proper check is society placing upon the marriage of the unfit? Is there any boy or girl so immature, if only the legal age of consent has been reached; is there any "delinquent" so dangerous through inherited tendencies to disease or crime; is there any worn-out debauchee, who cannot somewhere find a magistrate or a priest to tie the "sacred knot"? In sanctioning divorce the welfare of the children may well cause the state anxiety; but are there not thousands of so-called "homes" from whose corrupting and blighting shadow the sooner a child escapes the better both for it and society?

In some measure the problem of the family has now been stated. What are the means available for its solution? The raising of ideals is a slow process. It will come only in relatively small degree through the statute-maker. Yet the function of legislation is important. Good laws constitute a favorable environment for spiritual progress. Already much effective work has been done, yet in almost every direction there is urgent need of reform. In particular our matrimonial laws should be thoroughly overhauled. The so-called "common law marriage" — a fruitful source of social anarchy — ought to be absolutely abolished. The illogical and awkward system of optional lay or ecclesiastical celebration should be superseded by obligatory civil marriage on the European model. The administrative system governing the preliminaries of marriage should be amended so as to relieve America from the scandal of clandestine weddings of the St. Joseph (Michigan) pattern. The achievement of a wisely conceived and carefully drafted uniform matrimonial law for the entire country ought to be more zealously taken in hand. At present, through the state commissions on uniform legislation, practical workers are urging the adoption of a model statute relating to divorce. Perhaps conventions of groups of states might be used to advantage. In the end it may be found necessary, under a constitu-



tional amendment, to appeal to the federal power. What service could a national legislature render more beneficent than the creation of a code embracing every division of the intricate law of marriage and divorce? Aside from its educational value as a moral force, such a code in material ways would prove a powerful guaranty of social order and stability.

Far more important in the solution of the problem is the function of education. Apparently the salvation of the family must come mainly through the vitalizing, regenerative power of a more efficient moral, physical, and social training of the young. The home and the family must enter into the educational curriculum. In the sphere of the domestic institutions, even more imperatively than in that of politics or economics, there is need of light and publicity. It is vain to turn back the hand on the dial. The process of individualization for the sake of socialization should be frankly accepted. The old coercive bonds of the family cannot be restored. A way must be found to replace them by spiritual ties which will hold father, mother, and child together in the discharge of a common function in the altered environment.

The new social education must grapple fundamentally with the whole group of problems which concern the family, marriage, and the home. Through conscious effort the home should become an educational institution in which the family receives its most intimate training. In the work every grade in the educational structure from the university to the kindergarten must have its appropriate share. Already departments of sociology, social science, domestic science, and physical culture are giving instruction of real value; but the training should be broadened and deepened. Moreover, the elements of such a training in domestic sociology should find a place in the public school programme. Where now, except perchance in an indirect or perfunctory way, does the school-boy or girl get any practical suggestion as to home-building, the right social relations of parent and child, much less regarding marriage and the fundamental question of the sexual life? Indeed, almost the entire methodology of such instruction has yet to be devised. Is it visionary to hope that right methods may be developed for safely dealing even with such matters?

In the future educational programme sex questions must hold an honorable place. Progress in this direction may be slow because of the false shame, the prurient delicacy, now widely prevalent touching everything connected with the sexual life. The folly of parents in leaving their children in ignorance of the laws of sex is notorious; yet how much safer than ignorance is knowledge as a shield for innocence!

It is of the greatest moment to society that the young should be trained in the general laws of heredity. Everywhere men and



women are marrying in utter contempt of the warnings of science. Domestic animals are literally better bred than are human beings. There must be a higher ideal of sexual choice. Experience shows that in wedlock natural and sexual selection should play a smaller, and artificial selection a larger, rôle; the safety of the social body requires that a check be put upon the propagation of the unfit. Here the state has a function to perform. In the future much more than now, let us hope, the marriage of persons mentally delinquent or tainted by hereditary disease or crime will be legally restrained.

Moreover, the social culture of the future must consciously foster a higher race-altruism which shall be capable of present sacrifice for the permanent good of the coming generations. A wise sociologist has already outlined the elements of a new science of Eugenics — a science dealing with all the influences which improve and develop to advantage the inborn qualities of the race.<sup>1</sup> Indeed, family sentiment in some measure must yield to race sentiment. Too often at present family sentiment is but an expression of avid selfishness and greed which are no slight hindrance to sociological progress. “When human beings and families rationally subordinate their own interests as perfectly to the welfare of future generations as do animals under the control of instinct,” says Dr. Wood,<sup>2</sup> “the world will have a more enduring type of family life than exists at present.” May we not confidently believe that the family, surmounting the dangers which beset it, is capable of developing new powers and discharging new functions of vital importance to mankind? In the even partnership of the domestic union, knit together by psychic as well as physical ties, the house-father and the house-mother are already becoming more conscious of their higher function and responsibility as father and mother of the race.

<sup>1</sup> Galton, *Eugenics: Its Definition, Scope, and Aims*, in *American Journal of Sociology*, x, 1 ff.

<sup>2</sup> Dr. Thomas D. Wood, *Some Controlling Ideals of the Family Life of the Future*, 27.

## THE PROBLEM OF THE FAMILY

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WITHIN the last twenty-five or thirty years there has come to be recognized a problem of the family. It is the object of this paper to give a brief outline of this problem, especially as it has been treated in this country within this period, and then to look a little at some phases of it that seem most likely to call for attention in the early future.

Interest in the subject is due to two classes of causes: The first of these is the practical one — the growth of certain evils affecting the family. Mormon polygamy, the increase almost everywhere throughout the civilized world of the rate of divorce and the immense volume of it in the United States, the decrease of the marriage-rate and the postponement of marriage, the prevalence of unchastity and the lightness with which its offenses are regarded, the decrease of the birth-rate among those best fitted by their own training and resources to rear large families, the growing self-assertion of youth, and the lessened power of the home over character have combined to bring the family to the front as one of the most vital subjects for practical consideration.

The other cause is the new social conceptions of the times and the interest in the study of social problems in a scientific way. We are coming to see that what we call society is a most interesting as well as a most important subject of scientific study. In a way it has been studied for all the centuries of human learning. But we are now at work on it in the new field of social science with sociology and the social sciences for our instruments. In the pursuit of this line of study students are confronted everywhere with the family in some of its forms. In its history they find in great degree the story of the other great social institutions. And it has become apparent that the progress of social science must continue to interest students in the past, present, and future of the family.

As we cannot understand the present problem nor form a wise opinion about its future without some knowledge of the way in which the present came about, let us look a moment at some of the changes

that have brought the evils that we have noted. We will begin with the introduction of Christianity into the Roman world.

The Founder of the Christian religion threw into the minds of his disciples, in response to their question about divorce, the features of the ideal family in graphic outline. The chief apostolic writer dealt with the subject in relation to practical questions that came up bearing on the relation of individuals to each other, with little or no reference to the family as an institution. The work of the early church was directed to the rescue of individual men and women rather than to the creation or reestablishment of a social order. The rules of the early church, the canon law of following centuries, were taken up with the regulation of the duties of individuals. Marriage, divorce, chastity, and celibacy, and the whole round of the domestic virtues were treated almost wholly from the individualistic point of view. Indeed, one may go through a volume giving a digest of the entire canon law of marriage and divorce without meeting with the word family or its idea a single time. It is always the individual that is under treatment. The same is largely true of all except the more recent treatises on divorce. They scarcely mention the family. For this reason and for its excessive reliance on the grammar and lexicon for the interpretation of the Scriptures of the Christian church the ecclesiastical literature of the divorce question is dreary reading for the student of sociology who knows how profoundly this and all questions of the family are at the root of sociological questions. And this early trend of Christianity was unwittingly accelerated by the condition of Roman law at the time when the canon law was formed. For, as Sir Henry Maine pointed out, Roman law had at that time passed from the family as its unit to the individual, and in its conception of social relations from status to contract. It was this debased form of the Roman law that became the matrix in which the canon law was molded. Thus the method of the early church and the condition of the Roman law of the times combined to treat domestic relations along individualistic lines with little consciousness of the family and its significance.

The social ideas of a later period emphasized this tendency. The Protestant Reformation was a protest against the claims of the church by an assertion of the individual. The note of Protestantism is distinctly individualistic. The position of Luther on divorce was a natural consequence of it. But the influence of it on the religious methods of the churches that came into being as a result of the Reformation contributed still more powerfully to the forces that made for an individualistic conception of the social order. Then the invention of printing in a degree took the power of control over life away from the church and put it into the hands of every one who could read. The invention of gunpowder made the individual

soldier a new force in war as compared with the mounted officer and his retainers. The discovery of America opened a new field to individual enterprise. And a little later the impulse to modern science was given by the beginnings of the method of scientific study.

Within the last two centuries individualism received another impetus. The ethical philosophy of Locke made its mark on the theology of New England. It powerfully affected the political thinking of the times. Rousseau and Jefferson either directly or indirectly felt its profound influence. And through its effect on the theology of New England it came to mold in some degree the thinking of the political leaders of the American Revolution. The war of American Independence was fought on the rights of the individual. Blackstone is an example of the influence of individualism in law and Adam Smith of its power in the new science of political economy. Priestley and Franklin may be noted in the realm of natural science. And we should not overlook the results of the inventions of the period. The coming of the power loom and the spinning-jenny, also in the latter part of the eighteenth century, led to the transfer of labor from the home to the factory.

The early half of the nineteenth century witnessed another series of events in the same direction. The spread of the Sunday-school relieved the home of much of its responsibility for the religious training of the young, and the growth of the public school system had a similar effect in another direction. Perhaps a better statement would be that the rise of these two institutions withdrew attention from the home as a source of education and unconsciously prevented its development as an educational force. The great revival work of the first half of the last century and the tendency of the general work of the churches had the same effect. It was a century of the device and use of societies of the communal form and not one that attended directly to the home.

Then followed the temperance reformation, based on the rescue of persons one by one by the individual pledge, the anti-slavery reform founded on the rights of the individual, and the woman's rights movement, which was another application of the same principle. The use of steam power in manufacture, in transportation, and in printing, the invention of the uses of electricity, and the great migration to the west in this period all aided the movement of forces making for individualism and supporting it. America has felt the force of this movement beyond any other country, both for good and for evil. The United States have been the very centre of this stream of modern civilization. The problem is, therefore, more acute here than anywhere else. The subject is a most serious one. What has been done towards its treatment?



The Civil War marked a turn in our political conceptions. It changed us from a federation to a nation. This introduced to the popular mind the political idea of a status, or perhaps that of organic relations instead of a social relation of mere contract. Horace Bushnell had still earlier taught the principle of organism to the churches of his faith, though little heed was given to its wide applications. Sir Henry S. Maine of the historical school and Bachofen of the evolutionary, both in the same year — 1861 — pointed out the significance of the family to the student of society. Then came the work of Spencer — begun much earlier — and that of Morgan, Lubbock, McLennan, Hearn, Lyall, Fustel de Coulanges, Starcke, Westermarck, and others on the Continent of Europe, less accessible to English readers. All these dealt more or less directly with the family but in ancient or early types of society. Still there was no study of the family in any of our higher educational institutions. There was no book on the family in the English language prior to 1880. Probably there were few with that title in any language.

But within the last twenty-five years a great change has been going on in the literature of the subject. Bodio in Italy, Bertillon in France published their pamphlets on statistics of divorce. In 1889 our government issued its great report on statistics of marriage and divorce in this country and Europe; and later the British House of Lords published a collection, though a much less extensive one. Germany, France, England, Australia, Japan, and two or three more American states have begun to collect and publish this class of statistics annually. We are now able to study the subject statistically with some completeness.

Within the last twenty years the laws of many of our states have been amended for the better. New York has practically abolished its old so-called common-law marriage. The marriage of defective persons has been forbidden in several states. The systems of marriage licenses have been improved so as to check improper marriages, and the marriage of minors better regulated. Many states have provided for the more accurate record and return of marriages. Six states have raised the term of residence before a divorce can be sought in their courts from ninety days, and six months, to one year, and Congress has made this term the law for all the territories. One state — Delaware — now forbids divorce to all non-residents unless the cause for which divorce is sought is also a statutory cause in the state of former residence. Limited divorce has been provided in three more states. Stricter provisions regarding notice, the abolition of the notorious "omnibus" clause in nearly the last of the states where it existed, the reduction of the grounds for divorce from four to one in the District of Columbia, the prohibition of legislative divorces in Delaware — the only state where this practice lingered —



the restriction of the remarriage of the defendant or of both parties in fourteen states, and the prohibition of the advertising of divorce business in six, are some of the features of the divorce legislation of the last twenty-five years.

Meanwhile Congress has, as already intimated, made the term of residence before a divorce can be sought one year for all the territories and for the District of Columbia, and thirty or more states have created commissions to secure uniformity of law on these and other subjects of common concern. France enacted a new divorce law in 1884, and an imperial law uniform for all the Empire went into operation in Germany in 1901. New South Wales greatly modified its divorce law a few years ago, and now the new constitution of Australia provides for a uniform law throughout the federation. Japan has for the first time brought her people under the control of public law in respect to marriage and divorce, having established a marriage and divorce code very much like the *Familienrecht* of Germany. The age of consent — so-called — has been raised in many states of this country.

An important educational work relating to the family has begun within the last twenty years. Twenty-five years ago there was no study of the family in any of our educational institutions. Indeed, there was not then a single course of lectures given on the subject anywhere in the entire country. Now such courses of lectures or of study are frequent. Perhaps it may already be said that the higher educational institution that does nothing with the family has become the exception rather than the rule. The colleges for women have opened this important line of study to their students. And the study is taking on more practical form in what is now known as domestic science, but which, as pursued, is confined pretty closely to the study of housekeeping in its practical aspects, but along scientific lines. Domestic science has also become a department in some of our best secondary schools and is rapidly growing in public favor. There has been, too, a marked increase of attention to the home in the periodical press. Departments or pages for the home have taken the place of the old single column and are of a much more scientific character and more valuable as a whole.

I am speaking of the United States. Perhaps more has been done in parts of Europe. Within the last twenty-five years attention has been given in new ways to the practical value of the home in a number of directions, that is full of promise for the future. Our American churches, in their large use of the voluntary principle of organization, have had unusual opportunities for experiment, which some of them have used to advantage. They have developed a great number of small societies within the local churches for doing work by collections of individuals in groups of a portion of their adherents.

These have grown so that it is not uncommon to find a dozen of these little societies within a single church with a congregation of three hundred people. An incidental evil of this movement has been the concentration of attention and effort on collections of people in some central place of assembly to the neglect of the neighborhood and the home as centres of work.

But perception of this incidental evil has led to the invention of the Home Department of the Sunday-school. This provides for the use of the home as a place of Bible study for those who cannot or will not attend at the place of public assembly. Its practical value in additions to the Sunday-school—already numbering 400,000—has won for it great favor. But its higher aim of showing that a great gain comes to the church when it brings the dormant forces of the home into activity is its best credential.

Interest has been awakened in the home as a factor in public school education. Under the lead of our National Superintendent of Education our people are beginning to see that there is more than one social institution at work in education; that, as he puts it, the great educational factors are the school, the church, the home, and the vocation; and the problem is to get each of these to do its share in the common task, and that in intelligent coöperation with each other. While the public school has as yet nothing like the Home Department of the Sunday-school, unless it be its required home study, it is having more aid than formerly in progressive communities from parental associations. It has already in some degree the benefit of the conviction that educational work constantly goes on in the life of the home and in the activities that engage the child outside the school-room. There is, too, it can hardly be doubted, a deeper sense of the fact that the educational processes of the adult in daily life are not essentially unlike those of the school-room and that there is more real unity between the study of the child at school and that of the parent at his work than we once thought. This is giving an educational importance to the home that is slowly telling for its good as well as for the good of parent and child.<sup>1</sup>

In philanthropy we may note a steadily growing recognition of the place of the home in social reform. In Massachusetts and perhaps elsewhere, the charitable institution where large numbers of children have been gathered for care has given place to the single home. For it has been found that the average home available for the care of destitute children is a more natural, and, therefore, a better place, for the training of a child than the artificial life of a great caravansary. Poor relief is abandoning its former habit of reliance on the almshouse and the gift of money. It now seeks to keep the family

<sup>1</sup> As this goes to press two educational experts tell me that the proper connection of the home with the school and the discovery of the educational function of the home is now, in their opinion, the most urgent of educational problems.

together and to put the home on its own feet and lead it to self-support. The use of the social settlement in our cities tends strongly in the same direction. Indeed, it is almost a first principle of all expert charitable work now to make respect for the home and all possible use of its resources a cardinal principle of all philanthropic effort. The vigorous attack on the tenement-house problem proceeds on the assumption that the single home is the goal of its efforts and is already doing much to demonstrate the social and moral value of the home. Those who are dealing with the criminal are more and more impressed with the need of a better home life as the greatest single aid to the relief of society from the burdens of crime, and the surest protection against the beginnings of a criminal career. And the students of the evils of intemperance and licentiousness have of late come to see that the home, in its moral training, its cooking, and social activities, is, after all, one of the most important objects of their concern. Some go so far as to say that it is the most important of all. Something has been done to meet the evils of sexual vice. The more noticeable of these efforts are those of the Woman's Christian Temperance Union and the report of the Committee of Fifteen in New York.

I think a careful study of the conditions in these several directions can hardly fail to convince the thoughtful student that, with all the apparent evils of an excessive individualism, there has been slowly gathering within the last quarter of a century the forces of a strong movement in the direction of a better understanding and a better use of the home. I am speaking, let it be noted, of the *excesses* of individualism and am not forgetful of its invaluable contributions to social progress. Beneath all is a growing sense of the importance of those social relations that lie back of individual agreements and individual interests. The conviction that life is a unity and that this unity implies what may properly be called an organism is growing. And we are beginning to perceive that what is true of society as a whole may be true of its constitutional and characteristic institutions.

Such in brief outline is the present condition of the problem of the family under the treatment it has received in the last twenty years or so. From this survey it is not difficult to learn something of the work immediately before us. This work is both practical and scientific. Let us look first at the practical phases of it.

It is obvious that the experimental work of our state legislation should go on. Our political system has the great advantage for a democracy, with all its peculiar disadvantages, of enabling one or more states to make experiments for the benefit of the rest without involving the whole country in their risk. The summary of the legislation on marriage and divorce already given illustrates this. We have the results of these independent experiments and can see in

them a tendency towards a common system of family law. Now that we have Dr. Howard's history of the entire legislation of the country from the earliest times, comparative study will undoubtedly greatly increase this tendency towards uniformity. Our whole course will be more intelligently taken.

The work of the State Commissions on Uniform Laws on our marriage and divorce laws, and on the other subjects assigned to them, will probably promote this object. There are now, or have been, thirty-five states and territories engaged in this work. If Congress could appoint a commission on the part of the general government to coöperate with the state commissions and also provide a moderate sum of money for the necessary expenses of the work, which is now done by men who serve without pay, progress would be greatly facilitated.<sup>1</sup>

The proposal for an amendment of the Constitution of the United States presents so many difficulties that it has been laid aside, at least until the commissions have time to show what they can do and what the elements of a good uniform law are. It is apparently impossible to get three fourths of the states to agree to any transfer of power from the states to the general government. And it is coming to be understood that the attempt to prescribe by an amendment a uniform system of marriage and divorce law, to be administered by the states, would expose the law to those risks that have defeated the object of the amendments adopted at the close of the Civil War. Then, should marriage and divorce be brought under the jurisdiction of the general government and its courts, what about the other branches of family law? Would the laws affecting inheritance and the care of children have to come under the same class of courts, whether state or federal? Or may these difficulties be surmounted? Such are some of the questions to be answered.

The possibility of working all our laws touching the family in any way into a consistent system of family law, such as I understand the *Familienrecht* of Germany to be, is also a part of the subject that should receive due consideration. And the growing intimacy of the nations may lead to some efforts at international uniformity.

A peculiarity of the political attitude in this country towards the family should not be overlooked. In Great Britain the family has a marked place in the political system of the country. The Crown depends on the family. One branch of Parliament is made up in the main of those whose position depends on the family relationship. And the British family is further protected by the right of primogeniture. The family in this way is wrought into the very texture of

<sup>1</sup> Under the lead of Pennsylvania the official delegates of thirty-nine states met in Washington in February, 1906, and agreed on seventeen resolutions as a basis for a uniform divorce law. A special committee is to report a proposed code, incorporating the ideas of these resolutions, at a later meeting.



the British constitution. The conserving influence of this system must be very considerable. But in the United States the family has no such constitutional position. It has no place either in the constitution of the United States or in the constitutions of the states themselves. We are as democratic in respect to the family as we are regarding the individual. With us the legal protection of the family is unsupported by any political recognition of it. And this difference is characteristic of most European countries. We are marked by a democracy of the family as clearly as we are by a democracy of the individual. And this imposes on us the disadvantages as well as the advantages of our democracy. I do not think this point has received the serious attention it deserves if, indeed, it has been noticed at all. Certainly this condition would seem to imply that, lacking the advantage of political recognition, the American family should receive unusual care in other ways to insure its integrity and social effectiveness.

The place of the family in the practical problems of economics and philanthropy will call for much more attention than it has been receiving. It is singular that, though the very word *economics* means the law of the house, yet the modern science, until within a very recent period, has largely neglected to consider the home as a very serious factor in the science. It is becoming to be understood now, however, that for the mass of mankind the home supplies by far the greater part of the motives for industry and for the accumulation of capital. The home, too, has a great deal to do with the efficiency of both labor and capital. For its training does much to supply those qualities of mind as well as those habits of industry which determine the value of both labor and capital. But the attention of those interested in the problems of capital and labor has not been sufficiently concentrated on this economic value of the home. The business need of an intelligent and advancing home life should have even more attention than it has been getting. The mere search for a laborer of simply industrial efficiency needs to be accompanied by more attention to those influences that make him valuable. Our entire people ought to see more clearly that they cannot afford to convert all the women and children of a family into wage-earners while they reduce thereby the home to a mere place for feeding and sleeping. The rights of the home to its own highest development must not be sacrificed.

The problem of the housing of the poorer classes should be the subject of much further care and experiment. The provision of a home for a family having an income of at least eight or nine hundred dollars in our largest cities is perhaps in the way of easy solution. But there still remains the more difficult problem of securing a wholesome tenement for the family with a smaller income, or else of



raising the income to meet the need. And then there is the condition of the hundreds of thousands, if not of millions, of people who are living outside the cities in houses of one or two rooms, whose conditions are of the worst, but whose scattered situation or good air keeps them from attracting attention to their unwholesome character.

The relation of the home to poverty, to pauperism, to crime, to intemperance and to licentiousness needs far more attention than we have yet given to it. Those who work in these fields of philanthropy are increasingly sensible of the connection of their problems with the home. But this is not true of our people as a whole. Nor will the people perceive the connection until it has some concrete demonstration. More statistical work, therefore, should be done in this direction. But the old method of studying a single cause of a social evil at a time, like crime or intemperance, should be abandoned generally, as it now is by some few, who are expert in the subject, as unsound. Its results are misleading and have done much to make progress in social improvement slow. For every social effect, like a crime or a vice, is the result of more than one cause. And it is only as we analyze the conditions that meet us and try to recognize and measure the several contributing causes to a given social effect that we can reach conclusions of much value. The beginnings made in the last few years in a sounder method of statistical study need to be followed up. When this is done we shall have a better appreciation of the influence of the home for good or for evil in respect to the defective and delinquent classes of society.

More attention is undoubtedly to be given in the early future to the place of the family in education and in religion. I think this the most important direction for our practical work for the home to take. I say this both for the intrinsic value of the home in education and religion and because of the strong tendency away from the home that has been going on in both these fields the last hundred years, incidental to the growth of the public and Sunday-school systems, and of the large use that has been made of societies within the local church, which have either taken over to themselves the natural work of the home or have turned away attention from its development. The Sunday-school and the numerous societies for the training or activities of the young have absorbed the thought and care of pastors and churches so much that the home has not received its share of attention. The home has no such array of organizations, conventions, literature, and study to show as we have for our religious and secular schools. The Home Department of the Sunday-school is the only invention of any importance that has been made in the last hundred years in the interests of the home as a religious force.

But the growing perception that education is the result of several important educational agencies, that the home, the ch

vocation, and the library, together with the school, make up the great educational force of society and that a sound educational system must give due place to all of them, carefully adjusting them to each other, will soon make a careful study of all the field a necessity. The growing conception of the interorganic nature of all social problems will press this on us more and more. With it will, of course, come a much greater attention to the home as an educational factor of the greatest importance, both in the work of the church and the public school. The plea that the home is negligent or incompetent and that for this reason the church and school must do its neglected work, will be met under a sense of obligation to do something to make it competent and get it to attend to its own part of the common work. One of the greatest opportunities of the church and the school lies just here.

These are practical needs. But back of them all lies the need of much scientific study. Anything like an adequate science of the family is yet to be created, though considerable has been done in the last twenty years. The early history of the family has been pretty well explored in connection with the study of the evolution of society. And the monumental work of Dr. Howard just published on the *History of Matrimonial Institutions*, a work of wonderfully complete survey and much of it a contribution in an unexplored field, has laid every scholar under the greatest obligations. But there is a large unoccupied territory remaining to be entered or more fully explored. Dr. Howard's work, great as it is, concentrates attention on marriage and divorce — the beginning and the premature end of the family. The history of the modern family as a whole, as he well knows, remains to be written. Its place in the history of the Christian Church needs to be studied. It is a singular fact that ecclesiastical literature is singularly barren on this subject. All the great questions of the family — marriage, divorce, chastity, celibacy, and the like — have been much discussed, but very seldom has the family as a whole been distinctly taken into the consideration. These facts need to be brought out and their reasons set forth. The story of the family in the history of law, of politics, of education, of economics, almost needs discovery and relation. The statistical study of marriage and divorce, which was well begun in our Government Report of 1889, needs to be, and it is hoped will soon be brought down to date.<sup>1</sup> The number of American states and foreign countries that collect annually their statistics of marriage and divorce should be increased, so that this world-wide movement can be studied comparatively and be treated intelligently. Special investigations should be made here and there into the causes of the great increase of divorces, and perhaps

<sup>1</sup> Congress has since made provision for this and the supplementary report ordered may be ready in 1907.

some effort can be made to determine the extent of licentiousness. The decline of the birth-rate should receive careful attention. The determination of the classes among which the birth-rate is declining is very important. For if it is greatest among those best fitted by their intelligence and pecuniary condition to rear large families it becomes a far more serious problem than if it be found chiefly among the ignorant and the poor. The difficult but most important subject of sex merits scientific treatment.

Still farther and most pressing of all is the need of the most thorough investigation of the nature of the family and the home into which it grows, and its actual place in the human society of to-day and the place it should have. At present we are acting blindly and by rule of thumb. We rarely get beyond some conventional remarks and speak of the family as the "unit of society." It would puzzle most who use that phrase to tell what it means, even in their own thought of it. We need to ask ourselves, What is the family? What is the home? What is its true composition? What is its place in society? What are its functions? And what does it need from the point of view of the highest scientific consideration? What are the scientific defenses of monogamy as against polygamy on the one hand and free love on the other? What are the sound scientific reasons against easy divorce? How far and in what sense is marriage a contract? Is it a contract of such a nature as to permit of the remedies applied to contracts in business relations? Or is it a contract that establishes a status by which the parties are to abide? Is this status creative morally, and perhaps politically, of a new unity that is essentially an organic one? If so, may this unity be in some sense a moral personality, such as some have ascribed to the state? How far can the American people admit the contract theory in their treatment of the family after having rejected it as the political doctrine of the state?

Then in the flux of social conditions which marks our times nothing is more important than to have some sound basis of action to guide us. We must ask ourselves scientifically, for we shall have to do it practically, where are we to place the home in our work in religion, in education, in economics, in politics, and in social reform. Does the history and constitution of society point to any clear ideas, by which we may hope to guide ourselves in the readjustments that are going on?

Fundamentally these are problems for the sociologist. If the family, or rather the home, is in any considerable degree to social science what the atom is in physics and the cell is in biology, it is almost inevitable that social science must follow the method of those

<sup>1</sup> On these last points the reader may consult my paper on "The Theory of the Marriage Tie," in the *Andover Review* of November-December, 1893.

sciences so far at least as to concentrate attention on its study and discover that the home contains within it the great secrets of all the social sciences. Indeed, if this be true, the problems of the several social sciences themselves depend on this work for the home. Especially is it true of the problems of government, economics, religion, and pedagogy, that they all need a scientific knowledge of the home as an indispensable condition of their solution.

Take certain problems in religious organization for an illustration. The churches of the simpler type of organization, those of the independent polity especially and those closely approaching it, are facing the problem of reducing their heterogeneous collection of societies and committees to order. For a century these internal organizations of the communal type have been growing up until the distraction and overlapping of their work have led to confusion and waste, and the energies of pastors are scattered in so many directions that they can do almost nothing at all thoroughly. The pastor is the one man and the church is the one institution in the community that have profited least by the modern method of specialization of work and the organization of the corporation that brings specialization about. As has already been pointed out, the absorption of the ecclesiastical mind on the development of communal forms of association in the minor societies has led to neglect of the family as an agency of the greatest importance to the church. And the church is in need of the aid of sociological study. Its problems of polity are at bottom sociological problems and demand sociological treatment. The historical and comparative methods have an inviting field in the study of the structure and function of our social institutions as they are to-day. The church, for example, needs to see itself, its structure, and working in comparison with the town, the school, and the shop or other industry. The church needs to see how it has within it all the essentials of the municipal problem, and that the solution of the two problems — the ecclesiastical and the municipal — must go on together.<sup>1</sup>

Two forms of social institutions need study above all others. These are the domestic and the communal — what are very nearly the cell and the tissue of modern society. Both have received much attention in their archaic forms. The early village community has been pretty thoroughly exploited by the students of primitive society. So, too, has the early history of the family. But we have, somewhat prematurely I must think, jumped the next proper step and turned to the wider problems of race and the like, instead of mastering the present constitution of society, especially in the domestic and communal forms of to-day, in a scientific way.

<sup>1</sup> The insurance scandals have, since the above was written, greatly intensified interest in the problems of public service corporations and subsidiary organizations. But we have yet to see that some of our churches are not lacking in either of these forms of social organization, with possibly similar dangers.



We do not understand the structure of our society of to-day and the way in which it has grown out of the past. We do not see that our corporations, our churches, our schools as well as our municipal organizations, are the outgrowth of communal institutions of long ago and that the history of the modern home is closely interwoven with their rise and development. We do not see that municipal reform is closely allied with ecclesiastical reform and with corporate reform in general.

Here we must look to our universities for the original work that needs to be done in what may properly be called American sociology. The field for original work and for contributions to social science here, as well as for practical usefulness, is an open one and to my mind very attractive. Let us hope that it will soon be entered with enthusiasm. Some of us recall the great value of a little book on zoölogy by Agassiz and Gould that was put into the hands of college students forty or fifty years ago. How its classification and grouping of animal life stirred our imagination and opened to our boyish minds in an intelligent way the world it described! How it disclosed to us the value of the comparative method! And we remember the similar work that botanical science did for us in that day. Since those days other men have climbed on the shoulders of Agassiz and his co-workers and have seen farther and clearer. But the method remains and is continually winning new fields. But why should we not soon have a similar stimulating work done in social institutions? When it is done we shall have a different story of progress in the knowledge and treatment of the family than the one we tell to-day.

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#### SHORT PAPER

DR. FRANK SEWALL, of Washington, D. C., presented a short paper to this Section on "The Civic Ideal in the Family."



## SECTION B—THE RURAL COMMUNITY



## SECTION B—THE RURAL COMMUNITY

(Hall 5, September 21, 3 p. m.)

CHAIRMAN: HON. AARON JONES, Master of National Grange, South Bend, Indiana.

SPEAKERS: PROFESSOR MAX WEBER, University of Heidelberg.  
PRESIDENT KENYON L. BUTTERFIELD, Rhode Island State Agricultural College.

SECRETARY: PROFESSOR WILLIAM HILL, University of Chicago.

### THE RELATIONS OF THE RURAL COMMUNITY TO OTHER BRANCHES OF SOCIAL SCIENCE

(Translated by Professor Charles W. Seidenadel, Ph. D., University of Chicago)

BY MAX WEBER

[Max Weber, Regular Honorary Professor, University of Heidelberg. b. Erfurt, Germany, April 4, 1864. Dr. juris. Berlin, 1899. Assessor, Berlin, 1890; Privat-docent, University of Berlin, 1892; Special Professor of Commercial Law, *ibid.* 1893; Regular Professor of Political Economy, University of Freiburg, 1894; of Heidelberg, 1897; Regular Honorary Professor, Heidelberg, 1903. Author of *History of Commercial Societies*; *The Condition of Agriculture in Germany*, and numerous articles in commercial and scientific journals. Editor of *Archiv für Sozialwissenschaft*.]

YOUR committee has invited me to speak on "rural community," which I can understand only in the sense of "rural society," on account of the opposition of this society to the city and to industry as other topics of your programme. Your wish cannot possibly be fulfilled if taken in its literal sense. The social constitution of rural districts is the most individual and most connected with historical development of all social communities. It would not be reasonable to speak collectively on the rural conditions of Russia, Ireland, Sicily, Hungary, and the Black Belt. But even if I confine myself to the districts with developed capitalistic culture, it is scarcely possible to treat the subject from one common point of view. For a rural society, separate from the urban social community, does not exist at the present time in a great part of the modern civilized world. It does not exist in England any more, except, perhaps, in the thoughts of dreamers. The constant proprietor of the soil, the landlord, is not an agriculturist but a lessor; the temporary owner of the estate, the tenant or lessee, is an undertaker, a capitalist like others. The laborers are partly migrating laborers of the season, and the rest are journeymen of exactly the same class as other proletarians. All are joined together for a certain time and then are scattered again. If

there is a specific rural social problem it is only this: Whether and how the no longer existing rural community or society can arise anew so as to be strong and enduring.

But also in the United States, at least in the vast regions producing cereals, there does not exist now what might be called "rural society." The old New England town, the Mexican village, and the old slave plantation do not determine any longer the physiognomy of the country. And the peculiar conditions of the first settlements in the primeval forests and on the prairies have disappeared. The American farmer is an undertaker like others. Certainly there are numerous farmers' problems, mostly of a technical character or pertaining to the politics of communication, which have played their rôle in politics and have been excellently discussed by American scholars.

But there exists not yet any specific rural social problem. This is not the case since the abolition of slavery and the solution of the question, how the immense area of settlement which was in the hands of the Union have been disposed of. The present difficult social problems of the South are also in the rural districts essentially ethnical and not economical. You cannot establish, on the basis of questions concerning irrigation, railroad-tariff, homestead laws, etc., however important these matters are, a theory of rural community as a characteristic social formation; this may become different in the future. But if anything is characteristic in the rural conditions of the great wheat-producing states of America, it is — to speak in general terms — the absolute individualism of the farmers' economics, the quality of the farmer as a mere business man. This is quite different on the European Continent. It will, therefore, probably be better to explain briefly in what respect and for what reason it is different. The difference is caused by the specific effects of capitalism on the soil of old civilized countries and the much denser population of these countries. If a nation, as the German, supports its inhabitants, whose number is but little smaller than the white population of the United States, in a space smaller in size than the State of Texas, if it has founded and is determined to maintain its political position and the importance of its culture for the world upon this narrow, limited basis, the manner of the distribution of the soil gains determinative importance for the differentiation of the society and all economical and political conditions of the country. In consequence of the close congestion of the inhabitants and the lower valuation of the bare working forces the possibility of quickly acquiring estate which has not been inherited is limited. Thus social differentiation is necessarily fixed — a fate which also your country approaches. This increases the power of historical tradition, which is naturally the greatest in agricultural production, for which the

so-called "law of the decreasing production of the soil," the stronger bondage by the natural limits and conditions of production, the more constant limitation of quality and quantity of the means of production, diminish the importance of technical revolutions. In spite of technical progress production can be revolutionized least by purely rational division of labor and concentration of labor, acceleration of the change of capital, and substitution of the organic parts of raw material and working forces by inorganic raw materials and mechanical means of labor. This inevitably predominating power of tradition in agriculture creates and maintains, on the European Continent, those types of rural population which do not exist in a new country, as the United States; to these types belongs first the European peasant.

This peasant is totally different from the farmer in England or in America. The English farmer is, to-day, a sometimes quite remarkable undertaker and producer for the market; almost always he has rented the estate. The American farmer is an agriculturist who has mostly acquired, by purchase or as the first settler, the soil as his property; sometimes he has rented it. He produces for the market—the market is older than the producer here. The European peasant of the old type was a man who had, in most instances, inherited the soil and who produced mostly for his own wants. The market in Europe is younger than the producer. Of course, for many years the peasant sold the superfluous products and, though he spun and wove, could not satisfy his wants by his own work. But he did not produce to gain profit, like a business man, for the past two thousand years had not trained him to this. Up to the time of the French Revolution the European peasant was only considered as a means for the purpose of supporting certain ruling classes. In the first place his duty was to provide, as cheaply as possible, the neighbor-town with food. The city prohibited, as far as possible, rural trade and the exportation of cereals as long as its citizens were not provided. Thus matters remained up to the end of the eighteenth century; for the artificial maintenance of the cities at the expense of the country was also a principle of the princes who wanted to have money in their countries and large intakes from the taxes. Moreover, the peasant was doomed to support, by his services and by paying taxes, the proprietor of the land who possessed the superior ownership of his land and quite often also the right of the peasant's body. This remained so up to the revolutions of 1789 and 1848. Another of the peasant's duties was to pay to his political lord the taxes for his estate—from which the knight was exempt—and to supply the armies with recruits, from which the cities were exempt. This remained so until the tax-privileges were abolished and the service in the army became the duty of every one, in the nineteenth century.



Finally, the peasant was dependent upon the rural productive community into which the half-communistic settlement had placed him two thousand years ago. He could not manage as he wanted, but as the primeval rotation of crops prescribed. This remained so up to the dissolution of these half-communistic bonds. But also after the abolition of all this legal dependency the peasant could not become a rationally producing little agriculturist as, for instance, the American farmer. Together with the village and its characteristic contrast to the individual settlement of the American farmer, numerous relics of ancient communistic conditions of forest, water, pasture, and even arable soil, which united the peasants extraordinarily firm and tied them to the inherited form of husbandry, survived the liberation of the peasants. But to these relics of the past which America has never known, certain factors are added nowadays whose effects also America will one day experience, — the effect of modern capitalism under the conditions of completely settled old civilized countries. The limited territory causes there a specific social estimation of the ownership of land, and the tendency to retain it, by bequest, in the family. The superabundance of labor forces diminishes the desire to save labor by the use of machines. Where now by migration into the cities and foreign countries the working forces become limited and dear, there, on the other hand, the high price of the soil by purchase and hereditary divisions diminish the capital of the buyer. To gain a fortune by agriculture is not possible in Europe nowadays. The time in which this will be possible in the United States is approaching its limit. We will not forget that the modern boiling heat of capitalistic culture is connected with heedless consumption of natural material for which there is no substitute. The supply of coal and ore will still last for future times, which it is difficult to determine at present. The utilization of new forces, farm-land, here will also soon have reached an end; in Europe it no longer exists. The agriculturist can never hope, as husbandman, to gain more than a modest equivalent for his work. He is, in Europe, and also to a great extent in this country, excluded from participating in the great chances of speculative business talent.

The strong blast of modern capitalistic competition rushes, in agriculture, against a conservative opposing current, and it is exactly rising capitalism which, in old civilized countries, increases the counter-current. The use of the soil as investment of capital, and the sinking rate of interest in connection with the traditional social valuation of rural soil, push the price of real estate to such a height that the price of farm-land is always paid partly *au fonds perdu*, so to say, as *entrée*, as entrance fee into this social stratum. Thus capitalism causes the increase of the number of idle renters of land by the increase of capital for agricultural operation. Thus peculiar

contrasting effects of capitalism are produced; and these contrasting effects alone make the "flat land" in Europe appear as the support of a separate "rural society." For with the conditions of old civilized countries the differences caused by capitalism assume the character of a cultural contest. Two social tendencies resting upon entirely heterogeneous bases wrestle with each other. The old economic constitution asked: How can I give, on this given soil, work and sustenance to the greatest possible number of men? Capitalism asks: How can I produce as many crops as possible for the market from this given soil with as few men as possible. From the technical economical point of view of capitalism the old rural settlement of the country is, therefore, considered overpopulation. Capitalism produces the crops from the soil in mines, foundries, and machine factories. The past of thousands of years struggles against the invasion of the capitalistic spirit.

This combat assumes, however, partly the form of peaceable transformation. As to certain points of agricultural production the little peasant, if he knows how to free himself from the fetters of tradition, is able to adapt himself to the conditions of the new husbandry. The rising rate of rent in the vicinity of the cities, the rising prices for meat, dairy products, and garden vegetables, the intensive care of the young cattle, which the self-working small farmer can employ, connected with the higher expense for hired men, usually opens very favorable opportunities to the little farmer who works without hired assistance, near wealthy centres of industry. This is the case everywhere, where the process of production is developed in the direction of increasing intensity of labor, not of capital.

The former peasant is transformed here, as we observe in France and southwestern Germany, into a laborer who is in the possession of his means of production and perseveres in this independence, because the intensity and high quality of his work, increased by his private interest in it, and his adaptability of it to the demand of the local market, procures for him an economical superiority, which continues to exist, even where the agriculture on a large scale would preponderate technically.

The great success of the formation of corporations among the small farmers of the Continent must be ascribed to these peculiar advantages which, in certain branches of production, the work of the responsible small agriculturists possesses in opposition to the hired labor of the large farmer. These corporations have proved to be the most influential means of the peasants' education for husbandry. But through these corporations new communities of husbandry are created, which bind the peasants together, and change this way of economic thinking and feeling from the purely individualistic form which the economic struggle for existence in industry assumes under the pres-

sure of competition. This, again, is only possible because the great importance of the natural conditions of production in agriculture, its being bound to place, time, and organic means of work, and their publicity weaken the effectiveness of the individual competition of the farmers among each other. But where those conditions of a specific economic superiority of small farming do not exist, because the importance of self-responsible work as to quality disappears behind that of capital, there the old peasant struggles for his existence as a hireling of capital. It is the high social valuation of the owner of the land that makes him a subject of capital and ties him psychologically to the clod; the loss of the estate means for him degradation in an old civilized country with stronger economic and social differentiation. Not rarely the peasant's struggle for existence becomes the economic selection in favor of the most frugal, *i. e.*, those most lacking culture. For the pressure of agricultural competition is not felt by him who uses his products not as articles of trade, but for his own consumption, sells but little thereof, and can, for this reason, buy but few other products. Thus sometimes a partial retrogression into natural husbandry occurs. Only with the French "system of two children" the peasant can maintain himself, for generations, as a small proprietor in the inherited possession. The obstacles which the peasant meets who wants to become a modern agriculturist urge the separation of the possession from management; the landlord keeps his capital for operation, and he can draw it out from husbandry. Partially the government tries to create a mean between property and lease.

The peasant cannot remain a peasant, and he cannot become a land-owner on account of the high valuation of the land.

It is not yet possible to speak of a real "contest" between capitalisms and the power of historical influence, in this case of growing conflicts between capital and ownership of the soil. It is a process of selection partly, and partly of depravation. Quite different conditions prevail where not only an unorganized multitude of peasants are powerless in the chains of the financial powers of the cities, but where there is an aristocratic stratum above the peasants, which struggles not only for its economic existence, but also for the social standing which the history of centuries has granted this class. This is the case especially where this aristocracy is not tied to the rural districts by pure financial interest, as is the English lord, or only by the interests of recreation and sport, but where its representatives are concerned, as agriculturists, in the economic conflict and are closely connected with the country.

Then the dissolving effects of capitalism are increased. Because ownership of land gives social position, the price of the large estates rises high above the value of their productivity. "Why did

God create him in his wrath?" The answer is: "Rents! Rents! Rents!" says Byron of the English landlord. And, in fact, rents are the economic basis of all aristocracies that need a gentlemanly, workless income for their existence. But exactly because the Prussian "Junker" despises the urban possession of money, capitalism makes him the rent-debtor. A strong, growing tension between city and country results therefrom. The conflict between capitalism and tradition is now tinged politically, for the question arises, if the economic and political power shall definitely pass over into the hands of the urban capitalism, whether the small rural centres of political intelligence with their peculiarly tinged social culture shall decay and the cities, as the only carriers of political, social, and esthetic culture, shall occupy the field of the combat. And this question is identical with the question whether people who were able to live for politics and the state, as the old, economically independent land aristocracy, shall be replaced by the exclusive domination of professional politicians who must live on politics and on the state. In the United States this question has been decided, at any rate for present days, by one of the bloodiest wars of modern times, which ended with the destruction of the aristocratic, social, and political centres of the rural districts. Even in America, with its democratic traditions handed down by Puritanism as an everlasting heirloom, the victory over the planters' aristocracy was difficult and was gained with great political and social sacrifices. But in countries with old civilization matters are much more complicated. For there the struggle between the power of the historical notions and the pressure of the capitalistic interests summon social forces to battle, as adversaries of civil capitalism, which in the United States were partly unknown, or stood partly on the side of the North.

A few remarks concerning this:

In the countries of old civilization and of limited possibilities of economic expansion money-making and its representatives play necessarily a considerably smaller social rôle than in a country that is still new. The importance of the class of state officials is and must be much greater in Europe than in the United States. The much more complicated social organization makes a host of specially trained officials, employed for lifetime, indispensable in Europe, which will exist in the United States only in a much smaller number even after the movement of civil service reform shall have attained all its aims. The jurist and officer of administration in Germany, in spite of the shorter and more intensive German college education for the university, is about thirty-five years old when his time of preparation and his unsalaried activity is completed and he obtains a salaried office. Therefore he can come only from wealthy circles. On the other hand, he is trained to unsalaried or low-salaried service, which



can find its reward only in the high social standing of his vocation; thus a character is stamped on him which is far from the interests of money-making and places him on the side of the adversaries of their dominion. If in old civilized countries, as in Germany, the necessity of a strong army arises, which Germany needs to maintain its independence, this means, for the political institutions, the support of an hereditary dynasty. Also the decided follower of democratic institutions — as I am — cannot wish to remove it where it has been preserved. For it is in military states, if not the only, yet the best, historically indorsed form (because it is interested personally in preservation of right and of a legal government), in which the Cæsarian dominion of the sword of military parvenus can be averted, by which France is again and again menaced. Hereditary monarchy — one may judge about it theoretically as one wants to judge — warrants to a state, which is forced to be a military state, the greatest freedom of the citizens — as great as it can be in a monarchy — and so long as the dynasty does not become degenerated, it will have the political support of the majority of the nation. The English Parliament knew very well why it offered Cromwell the crown, and equally well Cromwell's army knew why it prevented him from accepting it. Such an hereditary, privileged dynasty has a natural affinity with the holders of other social privileges. To these conservative forces belongs in the European countries the church; first the Roman Catholic Church, which, in European countries, even on account of the multitude of its followers, is a power of quite different importance and character that it possesses in Anglo-Saxon countries; also the Lutheran Church. Both churches support the peasant, with his conservative conduct of life, against the dominion of urban rationalistic culture. The rustic movement of corporation stands, to a great extent, under the guidance of clergymen, who are the only ones capable for leadership in the rustic districts. Ecclesiastic, political, and economic points of view are here intermingled. In Belgium the rural corporations are means of the clerical party in the conflict against the socialists; the latter are supported by the consumers' unions and the productive associations. In Italy almost nobody who does not present his confessional certificate finds credit with certain corporations. Likewise the aristocracy of a country finds strong backing in the church, although the Catholic Church is, in social regard, more democratic nowadays than formerly. The church is pleased with patriarchal conditions of labor because they are of personal human character, contrary to the purely commercial relations which capitalism creates. The church possesses the sentiment that the relation between a lord and a serf, but not the bare commercial conditions created by the labor market, can be developed and penetrated ethically. Deep, historically conditioned contrasts,



which have always separated Catholicism and Lutheranism from Calvinism, strengthen that anti-capitalistic attitude of the European churches.

Finally, in an old civilized country, the "aristocracy of education," the *Bildungsaristokratie*, as it likes to be called, a strong class of the population without personal interest in economics, views more skeptically and criticises more sharply the triumphal procession of capitalism than can be naturally and justly the case in a country, such, for instance, as the United States.

As soon as intellectual and esthetic education has become a profession, their representatives are bound by an inner affinity to all the carriers of ancient social culture, because also for them that profession cannot and must not be a source of heedless gain. They look distrustfully upon the abolition of traditional conditions of the community and upon the annihilation of all the innumerable ethical and esthetic values which cling to them. They doubt if the dominion of capital would give better, more lasting guaranties to personal liberty and to the development of intellectual, esthetic, and social culture which they represent, than the aristocracy of the past has given. They want to be ruled only by persons whose social culture they consider equivalent to their own; therefore they prefer the dominion of the economically independent aristocracy to the dominion of the professional politician. Thus it happens nowadays in the civilized countries — a peculiar and, in more than one respect, serious fact — that the representatives of the highest interests of culture turn their eyes back, stand with deep antipathy opposed to the inevitable development of capitalism, and refuse to coöperate in the rearing of the structure of the future. Moreover, the disciplined masses of working-men created by capitalism are naturally inclined to unite in a class party, if new districts for settlement are no longer available, and if the working-man is conscious of being forced to remain inevitably a proletarian, as long as he lives, which is bound to come about sooner or later also in this country, or has already come. The progress of capitalism is not hemmed in by this; the working-man's chances to gain political power are insignificant. Yet they weaken the political power of the citizen and strengthen that of the citizen's aristocratic adversaries. The downfall of the German civic liberalism is based upon the joined effectiveness of these motives. Thus in old countries, where such a rural community, aristocratically differentiated, exists, a complex of social and political problems arises. An American cannot understand the importance of agrarian questions upon the European Continent, especially in Germany, yea, even German politics, and must arrive at entirely wrong conclusions if he does not keep before his eyes these great complexes. It is a peculiar combination of motives which is effective in these old countries and

explains its deviation from American conditions. Besides the necessity of strong military preparations, there are essentially two factors: *First*, something which never existed in the greater part of America, which may be designated as *Rückständigkeit*, viz., the influence of a gradually disappearing older form of rural social constitution. The second factor, circumstances which have not yet become effective in America, but to which this country, which is so elated by every million of increased population and by every rise of the valuation of the soil, will infallibly be exposed, exactly as Europe has been: the dense population, the high value of the soil, the stronger differentiation of the profession and the peculiar conditions resulting therefrom, under which the rural community of old civilized countries opposes capitalism joined to the influence of great political and social powers which are only known to old countries. Capitalism produces, under these circumstances, even to-day effects in Europe which can be produced in America only in future days.

In consequence of all those influences, European capitalism, at least on the Continent, has a peculiar authoritative stamp which contrasts with the citizen's equality of rights and is usually distinctly felt by Americans. These authoritative tendencies, and that anti-capitalistic sentiment of all those factors of Continental society of which I have spoken, find their social backing in the conflict between the country aristocracy and the urban citizens. But the country aristocracy undergoes, under the influence of capitalism, serious inner transformations which alter completely the character the aristocracy has inherited from the past. I should like to show how this has taken place in the past and how it continues to be carried on in the present, by the example of Germany.

The social constitution of the rural districts in Germany shows sharp contrasts which every one traveling in the country does not fail to observe: the farther toward the west and south, the denser is the rural settlement, the more the small farmers predominate, the more dispersed and various is the culture; the farther toward the east, especially the northeast, the more extended are the fields of cereals, of sugar-beets, and potatoes, the more the gross culture prevails, the more numerous a rural class of journeymen without property stands in opposition to the aristocracy of land-owners. This difference is of great importance.

The class of the rural land-owners of Germany, consisting particularly of noblemen residing in the region east of the Elbe, rules politically the leading German state. The Prussian House of Lords represents this class, and the right of election gives them also a determinative position in the Prussian House of Representatives. It imprints upon the corps of officers of the army their character, as

well as upon the Prussian officials and upon the German diplomacy, which is almost exclusively in the hands of noblemen. The German student adopts their custom of life in the students' fraternities in universities, and also the civilian "officer of the reserve;" a growing part of all the more highly educated Germans belong to this rank. Their political sympathies and antipathies explain many of the most important presuppositions of German foreign politics. Their obstructionism impedes the progress of the laboring-class; the manufacturers alone would never be sufficiently strong to oppose the working-men under the democratic rights of electing representatives for the German *Reichstag*. They are the props of protectionism which industry alone would never have been able to accomplish. They support orthodoxy in the state church. Whatever remains and vestiges of authoritative conditions surprise the foreigner — who only sees the exterior side of Germany and has neither the time nor opportunity to enter into the essence of German culture — and cause the erroneous opinions which are circulated in foreign countries concerning Germany, results directly or indirectly from the influence of these classes, as many of the most important contrasts of our interior politics are based upon that difference of the rural social constitution between the east and the west.

The question arises: How can this difference be explained historically; for it has not always existed. Five centuries ago landlordship ruled the social constitution of the rural districts. However various were the conditions of the peasant's dependency which arose from this, and however complicated the social constitution of the country was, in one point harmony prevailed, in the thirteenth and fourteenth centuries; the usually far extended possessions of the feudal lord were nowhere — also not in the east — connected with gross culture; though the landlord cultivated a part of his estate, this culture was but little larger than peasants' culture. By far the greater part of his income depended upon the taxes which the peasants contributed. It is one of the most important questions of the German social history, how from this comparatively great uniformity the present strong contrast has arisen.

Exclusive landlordship was dissolved at the beginning of the nineteenth century, partly in consequence of the French Revolution or of the ideas disseminated by it, partly in consequence of the Revolution of 1848; the division of the rights of ownership of land between landlords and peasants has been abolished, the duties and taxes of the peasants have been removed. The brilliant investigations of Professor G. F. Knapp and his school have shown how decisive, for that kind of agrarian constitution which originated then and still exists, was the question: How was the estate divided, after the dissolution of the manor community, between the former land-

lords and the peasants? In the west and south the soil came, the greater part, into the hands of the peasants (or remained therein), but in the east a very large part fell into the hands of the former masters of the peasant, the *Rittergutsbesitzer*, who established there gross cultures with free laborers. But this was only the consequence of the fact that the uniformity of the agrarian constitution had disappeared before the emancipation of the peasants. The difference between the west and east was confirmed but not created by the same. The difference had existed, in its main points since the sixteenth century, and meanwhile had constantly grown. Landlordship had undergone interior changes before its dissolution. Everywhere in the east and west the endeavor of the landlords to increase their intakes was the urging factor. This desire had sprung up with the invasion of capitalism, the growing wealth of the inhabitants of cities, the growing possibility of selling agricultural products. The transformations effected in the west and south date partly back to the thirteenth century, in the east to the fifteenth century. The ways by which the landlords pursued their aim were characteristic. In the south and west they remained landlords, *i. e.*, they increased the rates of rent, interest, and taxes of the peasants, but they did not go into rural culture. In the east they became *Gutsherren*, cultivating lords; they appropriated parts of the peasants' land (the *legten Bauern*, as the saying was), procured thus a large estate for themselves, became agriculturists, and used the peasants as serfs to till their own soil. Gross culture existed there — only to a smaller extent and with labor of serfs — even before the emancipation of the peasants; but not in the west. What has caused this difference?

When this question is discussed, vast weight is laid upon the conduct of political power; indeed, this power was greatly interested in the formation of the agrarian constitution. Since the knight was exempted from paying taxes, the peasant was the only one in the country who paid them. When standing armies were established, the peasants furnished the recruits. This, in connection with certain points of view of commercialism, induced the rising territorial state to forbid by edicts the *Bauernlegen*, *i. e.*, the appropriation of the peasants' land by the lords, hence to protect the existing peasants' farms. The stronger the ruler of the country was, the better he succeeded; the mightier the nobility was, the less he succeeded. According to this the differences of the agrarian constitution in the east are based, to a great extent, upon these conditions of power. But in the west and south we find that, in spite of the greatest weakness of a great many states, in spite of the indubitable possibility to appropriate peasants' land, the landlords do not attempt this at all. They do not show at all any tendency to deprive the peasant, to



establish a gross culture, and to become agriculturists themselves. And also the important formation of the conditions of the peasants' rights to the soil cannot have been the decisive reason. In the east great numbers of peasants with originally very good rights of possession have disappeared; in the west also those with the most unfavorable rights of possession have been preserved because the landlords did not at all want to remove them.

The decisive question is, therefore: How did it happen that the landlord of the German south and west, although he had ample opportunity of appropriating the peasants' land, did not do this, while the eastern landlord deprived the peasants of their land in spite of the resistance of the power of the state?

This question can be put into a different form. The western landlord did not renounce the utilization of the peasants' land as a source of income when he renounced its appropriation. The difference is only that he used the peasants as taxpayers, while the landlord of the east, by becoming *Gutsherr*, began to use the peasants as a laboring force. Therefore, the question must be asked: Why there one thing, here another?

As with most historical developments, it is rather improbable that a single reason could be assigned as the exclusive cause of this different conduct of the landlords; for in this case we should chance upon this cause in the sources. Therefore, a long series of single causative factors have been adduced for explanation, especially by Professor von Below in a classical investigation in his work *Territorium und Stadt*. The question can only be, if the points of view can be augmented, especially from economical considerations. Let us see in which points there was difference between the conditions, in which the eastern and the western landlord were when endeavoring to extort from their peasants more than the traditional taxes.

The establishment of gross operations was facilitated, for the eastern landlords, by the fact that their landlordship as well as patrimonialization of the public powers had grown gradually on the soil of ancient liberty of the people; the east, on the contrary, was a territory of colonization. The patriarchal Slavonian social constitution was the edifice invaded by German clergymen in consequence of their superior education, German merchants and artisans in consequence of their superior technical and commercial skill, German knights in consequence of their superior military technic, and German peasants in consequence of their superior knowledge of agriculture. Moreover, in the time of the conquest of the east, German social constitution, together with the political forces, had been completely feudalized. The social constitution of the east was, from the very beginning, adapted to the social preëminence of the knight, and the German invasion altered this but little. The German peasant,



even under the most favorable conditions of settling, had lost the support given to him, also in the feudal period, by firm traditions, the old mutual protection, the jurisdiction of the community in the *Weistümer* in the west. The regularly more numerous Slavonian peasantry did not know anything of such traditions. Besides, in the west regularly the parcels of which the estates of the lords consisted, because they had gradually arisen upon originally free land, were intermingled even in single villages; they crossed everywhere the patrimonial rights of the small owners of territory and thus they secured for the peasant, by their variety and mutual conflicts, his toilsome existence; very frequently the peasant was politically, personally, and economically subjected to quite different lords. In the east the combination of lordship and patrimonial rights over a whole village was in the hand of one lord; the formation of a "manor," in the English sense, was regularly facilitated because much more frequently, from the very beginning, but one knight's court had been founded in a village or had originated already from the Slavonian social constitution. And finally there is an important factor, upon which Professor von Below correctly lays special stress: the estate of the knights in the east, though at first small in proportion to the entire territory of a village, was nevertheless usually much larger than was customary in the west. Therefore, the enlargement of the cultivation of his estate was, for the lord, not only much more easy than in the west, but also a much less remote idea. Thus from the very beginning there existed, in the method of the distribution of the land, the first inducement to differentiation between east and west. But this difference of the size of the original estate of the landlord was connected, as to its causes, with differences between the economic conditions of the east and those of the west; even in the Middle Ages considerably different conditions of existence were thus created for the ruling social class.

The west was more densely settled, and, which is decisive in our opinion, local communication, the exchange of goods within and between the smallest local communities, was undoubtedly more developed than in the east. This becomes evident by the fact that the west was so much more densely settled with towns. It is based partly upon the simple historical fact that the culture of the west was, in each respect, older, partly upon a less evident, but important geographical difference, the far greater variety of the agricultural division of the west in comparison with the east. Considered from a purely technical view, the communication on the extended plains of the German east must have met with less impediments than in the much intersected and differentiated territory of the west. But such technical possibilities of communication do not determine the measure of exchange; on the contrary, because, in the west and

south, bottoms, valleys of rivers, plateaux, are intermingled, because climatic and other natural conditions of the production of goods are very noticeably differentiated within narrow districts, the economic inducement to trade, to the development of a relatively intensive communication were so much stronger than on the large plains of the east where the neighboring towns have much more frequently nothing to exchange with each other (as even to-day), because all of them produce the same goods in consequence of the greater uniformity of production caused by their geographical situation. Historical and natural conditions of an intensive local trade were (and still are), for these reasons, more favorable in the west.

It is Professor von Below's merit to have pointed to the fact that, in the Middle Ages, the knighthood of the west was not only not exclusively but not even predominantly founded upon territorial possession. Taxes, toll traverse, rents, and imposts which depend upon a certain amount of local traffic played a rôle. This was undoubtedly much less possible in those days (as at present) in the east. Whoever wanted to live there as a knight must found his existence rather upon the income from his own operation of agriculture. Large organizations for the production of goods and for external commerce, as those of the "German Order," are only a different phase of the same fact; the monotony of Eastern production directed transportation into more distant regions, and the local money economy remained considerably inferior to that of the east, according to all symptoms. If the very uncertain possible estimations are only approximately correct, also the conditions of the peasants' existence in the east and west must have been very different. It is scarcely probable that the lord would have taken up the operation of agriculture with its toil, risk, and the little gentlemanly contact with the mercantile world, if he could have lived as well in the east as in the west on the peasants' taxes, tolls, tithes, and rents. But we may conjecture why it was not equally possible in the east as in the west; for to make it possible, the peasants must be economically able to pay taxes of considerable amount, sufficient for the wants of the landlord; it is by no means evident that the peasants could afford to do this. This would presuppose that the peasant's self-interest in the productivity of his land had reached a certain degree, that he himself had attained a certain amount of economic education. But nothing could and can be substituted for that educating influence which is exerted upon the peasant by an intensive formation of urban communities, by well-developed local communication, by opportunity and inducement to sell rural products in the nearest possible local markets; this great difference may still be seen by comparing the peasant of the plain of Baden with the peasant of the east.

It is not the natural difference of physical and chemical quantities of the soil or difference of the economic talent of the races, but the historically established economic *milieu* which forms the determinative factor in the difference of the results of peasants' agriculture.

A certain number of towns upon a given area was necessary to inspire the mass of the peasants with at least such a degree of interest in production that the lord was only enabled to draw from them the means necessary for his sustenance, using the peasants as "funds for interest." Where these influences of culture, which cannot be replaced even by the best labor and best will, were lacking, the peasant lacked frequently the possibility and always the incentive to push the income from his land beyond the traditional measure of his own needs.

But if number and area are compared, the cities in the east were much fewer in number than in the west and south. And the development of gross agriculture in the east dates characteristically from an epoch in which not the rise but the decadence of the cities, and a quite noticeable decadence, can be observed. For its surplusage of grain the east was thus directed to its development to an agricultural export territory, with all qualities of such. This direction reached its culmination in our century after the abolition of the English grain duties. On the other hand, several parts of the west needed, even at the end of the Middle Ages, large importations of foodstuffs, especially cattle. The entire contrast is perhaps most evidently expressed by the difference in the prices of almost all agricultural products in the east and west in favor of the latter, which difference was only lately removed in consequence of the hidden premiums of grain exportation which we now have granted for a decade. Even the railroads had somewhat diminished this difference, but left them, in the middle of the last century, still very great. The unreliable condition of German numismatical history, besides many other technical difficulties, prevents us from obtaining a sufficient quantity of reliable data for the Middle Ages, but it seems well-nigh impossible that it has been different in general in that period, in spite of great fluctuations in single instances.

If, therefore, the landlord wanted to make a more intensive use of his peasants, much greater difficulties obstructed in the east his plan to use them as funds for interest, on account of the peasants' traditional lack of development, the weakness of the local markets for rural products, and the smaller intensity of communication. I should like to ascribe to this circumstance a much greater importance — of course only in the form of an hypothesis yet to be proved at the sources — than has been done before, so far as I know: The landlord of the east has selected the method of operating his own agricultural estate, not because the gross operation was technically

more rational, — for this would have been true also for the west, — but because it was, under the historically established conditions, the only possible economic means to obtain a higher income. He became an operating landlord, and the peasant, bound more and more to the soil, became a serf with the duty to give his children to his lord as menials, to furnish his horses and wagons for husbandry, his own working force for all sorts of work of the entire year, while his own land was considered more and more a mere reward for his labor. In spite of the state's opposition the lord constantly expanded the land which he cultivated. When later on the emancipation of the peasants came, it could not, as on a 4th of August in France, cancel, in the German east, the landlords from the agrarian constitution. Not only because an impecuniary state with still undeveloped industry could not easily determine to renounce their gratuitous service in the administration and in the army, but above all, because the decree of the abrogation of the feudal rights there where lord and peasants found themselves in a production community did not decide at all the most important point: the fate of the soil which was considered to be in the possession of the landlord, not of the peasant. To declare it simply to be the peasants' property — as was done later in Russian Poland for political purposes, in order to ruin the Polish nobility — would have annihilated in Prussia some twenty thousand large operated estates, the only ones which the country then possessed; it would not only have obliterated a class of renters, as it did in France. Therefore only a part of the peasants, the larger estates, and only a part of their lands were saved from being encompassed by the landlords, the remainder was appropriated by the latter.

The east continued to be, and became henceforth more and more, the seat of agricultural capitalism, as industrial capitalism took its seat especially in the west. This development was completed by the Russian frontier, which cut off the rear country, for a gross industry which might arise in the east now placed its development closely behind that frontier to Russian Poland.

The Prussian *Rittergutsbesitzer* of the east, who was originated under these conditions, was a social product, very different from the English landlord. The English landlord is generally a lessor of land, not an agriculturist. His tributaries are not peasants, as in the Middle Ages, but capitalistic enterprises for cultivation of the land. He is the monopolist of the soil. The estate in his possession is kept in the family by the artful juristic mechanism of "entails," which arose, like the modern capitalistic monopolies, in a constant struggle with legislation; it is withheld from communication, obligation, division by bequest. The landlord stands outside of the rural productive community. Occasionally he assists his lessee with



loans of capital, but he enjoys an intangible existence as a lessor. As a social product he is a genuine child of capitalism, arisen under the pressure of those above-mentioned contrasting effects which capitalism produces in completely populated countries with an aristocratic social constitution. The "landed aristocrat" wishes to live as a gentleman at leisure. His normal striving aims at rents, not at profit. The technically sufficient measure of the estate and the measure of the property necessary for his maintenance are by no means in harmony with each other; more intensive operation, in German places, demands, for instance, the diminution of property; the rising luxury of the aristocratic class requires its enlargement, especially as the prices of products fall. Each purchase, each compensation of co-heirs, burdens the estate with heavy debts, while the operation of the estate becomes the more sensitive to fluctuating conjunctures the larger and more intensive it is. Only in an agrarian constitution, as the English, this development is abolished, which, together with the increased density of population and rising valuation of the land, endangers everywhere, nowadays, the existence of large rational agriculture, instead of the state's land monopoly which many reformers demand. The opposite extreme has been carried out — private monopoly of the land. But the private monopoly of the land produces, in certain economic respects, effects similar to those of the state's monopoly; it withdraws the soil from communication and separates operation from possession. Either may now go its own way. The interest of the capitalistic farmer striving after the undertaker's profit and the land-owner's interest in the rents, striving after the preservation of an inherited social position, run side by side without being tied to each other, as is the case with the agricultural operation of the free owners. The practical significance of this is that the elasticity of husbandry against agricultural crises is powerfully increased. The shock falls upon two strong shoulders, the land monopolist and the capitalistic landlord. The crisis results in lowering the rent, probably in the change of the lessee, in a gradual diminution of the cultivated soil, but not in a sudden destruction of many agricultural estates nor in any sudden social degradation of many land-owning families.

Quite different are the conditions of the eastern Prussian *Iunker*. He is a rural employer, a man of a thoroughly civilian type, esteemed according to the size of his estate and income; he possesses scarcely more than one and a half to two United States "sections," but by tradition he is incumbered with high life and aristocratic wants. He is usually the free owner of the soil which he cultivates, and which is sold and mortgaged, estimated for bequests, and acquired by compensating the co-heirs; hence it is always burdened anew with running interests. Therefore the owner alone is exposed to the fluctuation of



the market prices; he is involved in all economic and social conflicts, which always menace directly his existence. As long as the exportation of grain to England flourished, he was the strongest supporter of free trade, the fiercest opponent to the young German industry of the west that needed protection; but when the competition of younger and cheaper soils repelled him from the world market and finally attacked him at his own home, he became the most important ally of those manufacturers who, contrary to other important branches of German industry, demanded protection; and joined them in a common struggle against the workmen's demands. For meanwhile capitalism had also gnawed at the social character of the *Iunker* and his laborers. In the first half of the last century the *Iunker* was a rural patriarch. His laborers, the peasants whose land he had formerly appropriated, were by no means proletarians. They received, in consequence of the *Iunker's* impecuniosity, no wages, but a homestead, land, and the right of pasturage for their cows; during harvest-time and for threshing a certain portion of the grain, paid in wheat, etc. Thus they were, on a small scale, agriculturists with a direct interest in their lord's husbandry. But they were expropriated by the rising valuation of the land; their lord withheld pasture and land, kept his grain, and paid them wages instead. Thus the old community of interest was dissolved, the laborers became proletarians. The operation of agriculture became operation of the season, viz., restricted to a few months. The lord hires wandering farm-hands, since the maintenance of unoccupied laborers throughout the year would be too heavy a burden.

The more German industry grew up, in the west, to its present height, the more the population underwent an enormous change; emigration reached its culmination in the German east, where only lords and serfs existed in far extended districts and whence the farm laborers fled from their isolation and patriarchal dependency either across the ocean, to the United States, or into the smoky and dusty but socially more free air of the German factories. On the other hand, the owners of estates import whatever laborers they can get to do their work: Slavonians from beyond the frontier, who, as "cheaper hands," drive out the Germans. The owner of an estate acts to-day as every business man, and he must act thus, but his aristocratic traditions contrast with such action. He would like to be a landlord and must become a commercial undertaker and a civilian. Instead of him other powers endeavor to snatch the rôle of a landlord.

The industrial and commercial capitalists begin to absorb more and more the land. Manufacturers and merchants who have become rich buy the knights' estates, tie their possession to their family by a "feoffment in trust" (or "entails"), and use their estate as means to invade the aristocratic class. The *fideicomissum* of the

*parvenu* is one of the characteristic products of capitalism in an old country with aristocratic traditions and a military monarchy. In the German east the same thing takes place now which has been going on in England for centuries until the present conditions were established there and which America will also experience in future days, though only after all free land has been exhausted and after the economic pulsation of the country has slowed down.

For while it is correct to say that the burden of historical tradition does not overwhelm the United States and that the problems originating from the power of tradition do not exist here, yet the effects of the power of capitalism are the stronger and will, sooner or later, further the development of land monopolies. When the land has become sufficiently dear so as to secure a certain rent, when the accumulation of large fortunes has reached a still higher point than to-day, when, at the same time, the possibility of gaining proportionate profits by constant new investments in trade and industry has been diminished so far that the "captains of industry," as has occurred everywhere in the world, begin to strive for hereditary preservation of their possessions instead of new investments that bring both gain and danger, then, indeed, the desire of the capitalistic families to form a "nobility" will arise, probably not in form though in fact. The representatives of capitalism will not content themselves any longer with such harmless play as pedigree studies and the numerous pranks of social exclusiveness which startle so much the foreigner. Only when capital has arrived at this course and begins to monopolize the land to a great extent, will a great rural social question arise in the United States, a question which cannot be cut with the sword, as was the slave question. Industrial monopolies and trusts are institutions of limited duration; the conditions of production undergo changes, and the market does not know any everlasting valuation. Their power lacks also the authoritative character and the political aristocratic mark. Monopolies of the soil create infallibly a political aristocracy.

As far as Germany is concerned, in the east a certain approach to English conditions has begun in consequence of the tendencies of development, while the German southwest shows similarity with France in the social formation of the country. But, in general, the intensive English stock-breeding is not possible in the German east on account of the climate. Therefore capital absorbs only the soil which is most favorable for agriculture. But while the inferior districts in England remain uncultivated as pastures for sheep, in the German east they are settled by small farmers. This process has a peculiar feature, inasmuch as two nations, Germans and Slavonians, struggle with each other economically. The Polish

peasants who have fewer wants than the Germans, seem to gain the upper hand.

While thus under the pressure of conjuncture the frugal Slavonian small farmer gains territory from the German, the advance of culture toward the east, during the Middle Ages, founded upon the superiority of the older and higher culture, has changed completely to the contrary under the dominion of the capitalistic principle of the "cheaper hand." Whether also the United States will have to wrestle with similar problems in the future, nobody can foretell. The diminution of the agricultural operations in the wheat-producing states results, at present, from the growing intensity of the operation and from division of labor. But also the number of negro farms is growing and the migration from the country into the cities. If, thereby, the expansive power of the Anglo-Saxon-German settlement of the rural districts and, besides, the number of children of the old, inborn population are on the wane, and if, at the same time, the enormous immigration of uncivilized elements from eastern Europe grows, also here a rural population might soon arise which could not be assimilated by the historically transmitted culture of this country; this population would change forever the standard of the United States and would gradually form a community of a quite different type from the great creation of the Anglo-Saxon spirit.

For Germany, all fateful questions of our economic and social politics and of our national interests are closely connected with that contrast between the rural constitution of the east and that of the west and with its further development. To discuss here, in a foreign country, the practical problems arising therefrom I should not consider correct. Destiny which has incumbered us with a history of thousands of years, which has placed us in a country with a dense population and an intensive culture, which has forced us to maintain the splendor of our old culture, so to say, in an armed camp within a world bristling with arms, has placed before us these problems. We must match them.

The friendly nation whose guests we are does not yet know such problems; several of them this nation will probably never encounter. It has no old aristocracy; hence there do not exist the tensions caused by the contrast between authoritative tradition and the purely commercial character of modern economic conditions. Rightly it celebrates the purchase of the immense territory in whose centre we are here, as the real historical seal imprinted upon its democratic institutions; without this acquisition, with powerful and warlike neighbors at its side, it would be forced to wear the coat of mail like ourselves, who constantly keep in the drawer of our desks the march order in case of war. But on the other hand, the greater part of the problems for whose solution we are now working will

approach America within but few generations; the way in which they will be solved will determine the character of the future culture of this continent. It was perhaps never before, in history, made so easy for any nation to become a great civilized nation as for the American people. But according to human calculation it is also the last time, as long as the history of mankind shall last, that such conditions for a free and great development will be given, the areas of free soil vanishing now everywhere in the world.

One of my colleagues has quoted here the words of Carlyle: "Thousands of years have passed before thou couldst enter into life, and thousands of years to come wait in silence what thou wilt do with this thy life." I do not know if, as Carlyle believes, the single man can or will place himself, in his actions, upon the sounding-board of this sentiment. But a nation must do so, if its existence in history is to be of lasting value.

# THE SOCIAL PROBLEMS OF AMERICAN FARMERS

BY KENYON LEECH BUTTERFIELD

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THE title of this paper indicates that, for the present purpose, the words "the rural community" have been interpreted to apply chiefly to farmers. Eight millions of our people are classed by the census as "semi-urban." The village problem is an interesting and important field for social investigation, but we shall discuss only the conditions and needs of farmers.

In America the farm problem has not been adequately studied. So stupendous has been the development of our manufacturing industries, so marvelous the growth of our urban population, so pressing the questions raised by modern city life, that the social and economic interests of the American farmer have, as a rule, received minor consideration. We are impressed with the rise of cities like Chicago, forgetting for the moment that half of the American people still live under rural conditions. We are perplexed by the labor wars that are waged about us, for the time unmindful that one third of the workers of this country make their living immediately from the soil. We are astounded, and perhaps alarmed, at the great centralization of capital, possibly not realizing that the capital invested in agriculture in the United States nearly equals the combined capital invested in the manufacturing and railway industries. But if we pause to consider the scope and nature of the economic and social interests involved, we cannot avoid the conclusion that the farm problem is worthy of serious thought from students of our national welfare.

We are aware that agriculture does not hold the same relative rank among our industries that it did in former years, and that our city population has increased far more rapidly than has our rural population. We do not ignore the fact that urban industries are developing more rapidly than is agriculture, nor deny the seriousness of the actual depletion of rural population, and even of community decadence, in some portions of the Union. But these facts merely add to the importance of the farm question. And it should not be forgotten that there has been a large and constant growth both of our agricultural wealth and of our rural population. During



the last half-century there was a gain of 500 per cent in the value of farm property, while the non-urban population increased 250 per cent. Agriculture has been one of the chief elements of America's industrial greatness; it is still our dominant economic interest, and it will long remain at least a leading industry. The people of the farm have furnished a sturdy citizenship and have been the primary source of much of our best leadership in political, business, and professional life. For an indefinite future a large proportion of the American people will continue to live in a rural environment.

In a thorough discussion of the "social problems of American farmers" it would be desirable first of all to analyze with some detail the general question which we have called the farm problem. Only thus can we understand the social difficulties of the rural community, the significance of the social agencies designed to meet those difficulties, and the real ambitions and needs of the farming class. But time will permit merely a concise, and necessarily a somewhat dogmatic, statement of what the writer believes to be the ultimate farm problem in America. We may perhaps most quickly arrive at the conclusion by the process of elimination.

Current agricultural discussion would lead us to think that the farm problem is largely one of technique. The possibilities of the agricultural industry, in the light of applied science, emphasize the need of the farmer for more complete knowledge of soil and plant and animal, and for increased proficiency in utilizing this knowledge to secure greater production at less cost. This is a fundamental need. It lies at the basis of success in farming. But it is not the farm problem.

Business skill must be added, business methods enforced. The farmer must be not only a more skillful produce-grower, but also a keener produce-seller. But the moment we enter the realm of the market we step outside the individualistic aspect of the problem as embodied in the current doctrine of technical agricultural teaching, and are forced to consider the social aspect as emphasized, first of all, in the economic category of price. Here we find many factors — transportation cost, general market conditions at home and abroad, the status of other industries, and even legislative activities. The farm problem becomes an industrial question, not merely one of technical and business skill. Moreover, the problem is one of a successful industry as a whole, not merely the personal successes of even a respectable number of individual farmers. The farming class must progress as a unit.

But have we yet reached the heart of the question? Is the farm problem one of technique, plus business skill, plus these broad economic considerations? Is it not perfectly possible that agriculture as an industry may remain in a fairly satisfactory condition, and yet the farming class fail to maintain its status in the general social

order? Is it not, for instance, quite within the bounds of probability to imagine a good degree of economic strength in the agricultural industry existing side by side with either a peasant régime or a landlord-and-tenant system? Yet would we expect from either system the same social fruitage that has been harvested from our American yeomanry?

We conclude, then, that the farm problem consists in maintaining upon our farms a class of people who have succeeded in procuring for themselves the highest possible class status, not only in the industrial, but in the political and the social order—a relative status, moreover, that is measured by the demands of American ideals. The farm problem thus connects itself with the whole question of democratic civilization. This is not mere platitude. For we cannot properly judge the significance and the relation of the different industrial activities of our farmers, and especially the value of the various social agencies for rural betterment, except by the standard of class status. It is here that we seem to find the only satisfactory philosophy of rural progress.

We would not for a moment discredit the fundamental importance of movements that have for their purpose the improved technical skill of our farmers, better business management of the farm, and wiser study and control of market conditions. Indeed, we would call attention to the fact that social institutions are absolutely necessary means of securing these essential factors of industrial success. In the solution of the farm problem we must deliberately invoke the influence of quickened means of communication, of coöperation among farmers, of various means of education, and possibly even of religious institutions, to stimulate and direct industrial activity. What needs present emphasis is the fact that there is a definite, real, social end to be held in view as the goal of rural endeavor. The highest possible social status for the farming class is that end.

We may now, as briefly as possible, describe some of the difficulties that lie in the path of the farmers in their ambition to attain greater class efficiency and larger class influence, and some of the means at hand for minimizing the difficulties. A complete discussion of the farm problem should, of course, include thorough consideration of the technical, the business, and the economic questions implied by the struggle for industrial success; for industrial success is prerequisite to the achievement of the greatest social power of the farming class. But we shall consider only the social aspects of the problem.

### *Rural Isolation*

Perhaps the one great underlying social difficulty among American farmers is their comparatively isolated mode of life. The farmer's

family is isolated from other families. A small city of perhaps twenty thousand population will contain from four hundred to six hundred families per square mile, whereas a typical agricultural community in a prosperous agricultural state will hardly average more than ten families per square mile. The farming class is isolated from other classes. Farmers, of course, mingle considerably in a business and political way with the men of their trading town and county seat; but, broadly speaking, farmers do not associate freely with people living under urban conditions and possessing other than the rural point of view. It would be venturesome to suggest very definite generalizations with respect to the precise influence of these conditions because, so far as the writer is aware, the psychology of isolation has not been worked out. But two or three conclusions seem to be admissible, and for that matter rather generally accepted.

The well-known conservatism of the farming class is doubtless largely due to class isolation. Habits, ideas, traditions, and ideals have long life in the rural community. Changes come slowly. There is a tendency to tread the well-worn paths. The farmer does not easily keep in touch with rapid modern development, unless the movements or methods directly affect him. Physical agencies which improve social conditions, such as electric lights, telephones, and pavements, come to the city first. The atmosphere of the country speaks peace and quiet. Nature's routine of sunshine and storm, of summer and winter, encourages routine and repetition in the man who works with her.

A complement of this rural conservatism, which at first thought seems a paradox, but which probably grows out of these same conditions of isolation, is the intense radicalism of a rural community when once it breaks away from its moorings. Many farmers are unduly suspicious of others' motives; yet the same people often succumb to the wiles of the charlatan, whether medical or political. Farmers are usually conservative in politics and intensely loyal to party; but the Populist movement indicates the tendency to extremes when the old allegiance is left behind. Old methods of farming may be found alongside ill-considered attempts to raise new crops or to utilize untried machines.

Other effects of rural isolation are seen in a class provincialism that is hard to eradicate, and in the development of minds less alert to seize business advantages and less far-sighted than are developed by the intense industrial life of the town. There is time to brood over wrongs, real and imaginary. Personal prejudices often grow to be rank and coarse-fibered. Neighborhood feuds are not uncommon and are often virulent. Leadership is made difficult and sometimes impossible. It is easy to fall into personal habits that may mark off the farmer from other classes

of similar intelligence, and that bar him from his rightful social place.

It would, however, be distinctly unfair to the farm community if we did not emphasize some of the advantages that grow out of the rural mode of life. Farmers have time to think, and the typical American farmer is a man who has thought much and often deeply. A spirit of sturdy independence is generated, and freedom of will and of action is encouraged. Family life is nowhere so educative as in the country. The whole family coöperates for common ends, and in its individual members are bred the qualities of industry, patience, and perseverance. The manual work of the schools is but a makeshift for the old-fashioned training of the country-grown boy. Country life is an admirable preparation for the modern industrial and professional career.

Nevertheless, rural isolation is a real evil. Present-day living is so distinctively social, progress is so dependent upon social agencies, social development is so rapid, that if the farmer is to keep his status he must be fully in step with the rest of the army. He must secure the social viewpoint. The disadvantages of rural isolation are largely in the realm of the social relations, its advantages mostly on the individual and moral side. Farm life makes a strong individual; it is a serious menace to the achievement of class power.

A cure for isolation sometimes suggested is the gathering of the farmers into villages. This remedy, however, is of doubtful value. In the first place, the scheme is not immediately practicable. About three and one-half billions of dollars are now invested in farm buildings, and it will require some motive more powerful than that inspired by academic logic to transfer, even gradually, this investment to village groups. Moreover, it is possible to dispute the desirability of the remedy. The farm village at best must be a mere hamlet. It can secure for the farmer very few of the urban advantages he may want, except that of permitting closer daily intercourse between families. And it is questionable if the petty society of such a village can compensate for the freedom and purity of rural family life now existing. It may even be asserted with some degree of positiveness that the small village, on the moral and intellectual sides, is distinctly inferior to the isolated farm home.

At the present time rural isolation in America is being overcome by the development of better means of communication among farmers who still live on their farms. So successful are these means of communication proving that we cannot avoid the conclusion that herein lies the remedy. Improved wagon-roads, the rural free mail delivery, the farm telephone, trolley-lines through country districts, are bringing about a positive revolution in country living. They are curing the evils of isolation, without in the slightest degree



robbing the farm of its manifest advantages for family life. The farmers are being welded into a more compact society. They are being nurtured to greater alertness of mind, to greater keenness of observation, and the foundations are being laid for vastly enlarged social activities. The problem now is to extend these advantages to every rural community—in itself a task of huge proportions. If this can be done and isolation can be reduced to a minimum, the solution of all the other rural social problems will become vastly easier.

### *Farmers' Organization*

Organization is one of the pressing social problems that American farmers have to face. The importance of the question is intrinsic, because of the general social necessity for coöperation which characterizes modern life. Society is becoming consciously self-directive. The immediate phase of this growing self-direction lies in the attempts of various social groups to organize their powers for group advantage. And if, as seems probable, this group activity is to remain a dominant feature of social progress, even in a fairly coherent society, it is manifest that there will result more or less of competition among groups.

The farming class, if at all ambitious for group influence, can hardly avoid this tendency to organization. Farmers, indeed, more than any other class, need to organize. Their isolation makes thorough organization especially imperative. And the argument for coöperation gains force from the fact that relatively the agricultural population is declining. In the old days farmers ruled because of mere mass. That is no longer possible. The naïve statement that "farmers must organize because other classes are organizing" is really good social philosophy.

In the group competition just referred to there is a tendency for class interests to be put above general social welfare. This is a danger to be avoided in organization, not an argument against it. So the farmers' organization should be guarded, at this point, by adherence to the principle that organization must not only develop class power, but must be so directed as to permit the farmers to lend the full strength of their class to general social progress.

Organization thus becomes a test of class efficiency, and consequently a prerequisite for solving the farm problem. Can the farming class secure and maintain a fairly complete organization? Can it develop efficient leaders? Can it announce, in sound terms, its proposed group policy? Can it lend the group influence to genuine social progress? If so, the organization of farmers becomes a movement of preëminent importance.



Organization, moreover, is a powerful educational force. It arouses discussion of fundamental questions, diffuses knowledge, gives practice in public affairs, trains individuals in executive work, and, in fine, stimulates, as nothing else can, a class which is in special need of social incentive.

Organization is, however, difficult of accomplishment. While it would take us too far afield to discuss the history of farmers' organizations in America, we may briefly suggest some of the difficulties involved. For forty years the question has been a prominent one among the farmers, and these years have seen the rise and decline of several large associations. There have been apparently two great factors contributing to the downfall of these organizations. The first was a misapprehension, on the part of the farmers, of the feasibility of organizing themselves as a political phalanx; the second, a sentimental belief in the possibilities of business coöperation among farmers, more especially in lines outside their vocation. There is no place for class politics in America. There are some things legislation cannot cure. There are serious limitations to coöperative endeavor. It took many hard experiences for our farmers to learn these truths. But back of all lie some inherent difficulties, as, for instance, the number of people involved, their isolation, sectional interests, ingrained habits of independent action, of individual initiative, of suspicion of others' motives. There is often lack of perspective and unwillingness to invest in a procedure that does not promise immediate returns. The mere fact of failure has discredited the organization idea. There is lack of leadership; for the farm industry, while it often produces men of strong mind, keen perception, resolute will, does not, as a rule, develop executive capacity for large enterprises.

It is frequently asserted that farmers are the only class that has not organized. This is not strictly true. The difficulties enumerated are real difficulties and have seriously retarded farm organization. But if the progress made is not satisfactory, it is at least encouraging. On the purely business side, over five thousand coöperative societies among American farmers have been reported. In coöperative buying of supplies, coöperative selling of products, and coöperative insurance the volume of transactions reaches large figures. A host of societies of a purely educational nature exists among stock-breeders, fruit-growers, dairymen. It is true that no one general organization of farmers, embracing a large proportion of the class, has as yet been perfected. The nearest approach to it is the Grange, which, contrary to a popular notion, is in a prosperous condition, with a really large influence upon the social, financial, educational, and legislative interests of the farming class. It has had a steady growth during the past ten years, and is a quiet but

powerful factor in rural progress. The Grange is, perhaps, too conservative in its administrative policy. It has not at least succeeded in converting to its fold the farmers of the great Mississippi Valley. But it has workable machinery, it disavows partisan politics and selfish class interests, and it subordinates financial benefits, while emphasizing educational and broadly political advantages. It seems fair to interpret the principles of the Grange as wholly in line with the premise of this paper, that the farmers need to preserve their status, politically, industrially, and socially, and that organization is one of the fundamental methods they must use. The Grange, therefore, deserves to succeed, and indeed is succeeding.

The field of agricultural organization is an extensive one. But if the farm problem is to be satisfactorily solved, the American farmers must first secure reasonably complete organization.

### *Rural Education*

It is hardly necessary to assert that the education of that portion of the American people who live upon the land involves a question of the greatest significance. The subject naturally divides itself into two phases, one of which may be designated as rural education proper, the other as agricultural education. Rural education has to do with the education of people, more especially of the young, who live under rural conditions; agricultural education aims to prepare men and women for the specific vocation of agriculture. The rural school typifies the first; the agricultural school, the second. Rural education is but a section of the general school question; agricultural education is a branch of technical training. These two phases of the education of the farm population meet at many points, they must work in harmony, and together they form a distinct educational problem.

The serious difficulties in the rural school question are perhaps three: first, to secure a modern school, in efficiency somewhat comparable to the town school, without unduly increasing the school tax; second, so to enrich the curriculum and so to expand the functions of the school that the school shall become a vital and coherent part of the community life, on the one hand translating the rural environment into terms of character and mental efficiency, and on the other hand serving perfectly as a stepping-stone to the city schools and to urban careers; third, to provide adequate high-school facilities in the rural community.

The centralization of district schools and the transportation of pupils will probably prove to be more nearly a solution of all these difficulties than will any other one scheme. The plan permits the payment of higher wages for teachers and ought to secure better

instruction; it permits the employment of special teachers, as for nature-study or agriculture; it increases the efficiency of superintendence; it costs but little, if any, more than the district system; it leaves the school amid rural surroundings, while introducing into the school-room itself a larger volume, so to speak, of world-atmosphere; it contains possibilities for community service; it can easily be expanded into a high school of reputable grade.

There are two dangers, both somewhat grave, likely to arise from an urgent campaign for centralization. Even if the movement makes as great progress as could reasonably be expected, for a generation to come a large share, if not a major portion, of rural pupils will still be taught in the small, isolated, district school; there is danger that this district school may be neglected. Moreover, increased school machinery always invites undue reliance upon machine-like methods. Centralization permits, but does not guarantee, greater efficiency. A system like this one must be vitalized by constant and close touch with the life and needs and inspirations of the rural community itself.

Wherever centralization is not adopted, the consolidation of two or three schools — a modified form of centralization — may prove helpful. Where the district school still persists, there are one or two imperative requirements. Teachers must have considerably higher wages and longer tenure. There must be more efficient supervision. The state must assist in supporting the school, although only in part. The small schools must be correlated with some form of high school. The last point is of great importance because of the comparative absence in country communities of opportunity near at hand for *good* high-school training.

Agricultural education is distinctively technical, not in the restricted sense of mere technique or even of applied science, but in the sense that it must be frankly vocational. It has to do with the preparation of men and women for the business of farming and for life in the rural community.

Agricultural education should begin in the primary school. In this school the point of view, however, should be broadly pedagogical rather than immediately vocational. Fortunately, the wise teaching of nature-study, the training of pupils to know and to love nature, the constant illustrations from the rural environment, the continual appeal to personal observation and experience, absolute loyalty to the farm point of view, are not only sound pedagogy, but form the best possible background for future vocational study. Whether we call this early work "nature-study" or call it "agriculture" matters less than that the fundamental principle be recognized. It must first of all *educate*. The greatest difficulty in introducing such work into the primary school is to secure properly equipped teachers.

Perhaps the most stupendous undertaking in agricultural education is the adequate development of secondary education in agriculture. The overwhelming majority of young people who secure any agricultural schooling whatever must get it in institutions that academically are of secondary grade. This is a huge task. If developed to supply existing needs, it will call for an enormous expenditure of money and for the most careful planning. From the teaching viewpoint it is a difficult problem. Modern agriculture is based upon the sciences; it will not do, therefore, to establish schools in the mere art of farming. But these agricultural high schools must deal with pupils who are comparatively immature, and who almost invariably have had no preparation in science. Nor should the courses at these schools be ultra-technical. They are to prepare men and women for life on the farm — men and women who are to lead in rural development, and who must get some inkling at least of the real farm question and its solution. The agricultural school, therefore, presents a problem of great difficulty.

A perennial question in agricultural education is: What is the function of the agricultural college? We have not time to trace the history of these colleges, nor to elaborate the various views relative to their mission. But let us for a moment discuss their proper function in the light of the proposition that the preservation of the farmers' status is the real farm problem, for the college can be justified only as it finds its place among the social agencies helpful in the solution of the farm question.

In so far as the agricultural college, through its experiment station or otherwise, is an organ of research, it should carry its investigations into the economic and sociological fields, as well as pursue experiments in soil fertility and animal nutrition.

In the teaching of students, the agricultural college will continue the important work of training men for agricultural research, agricultural teaching, and expert supervision of various agricultural enterprises. But the college should put renewed emphasis upon its ability to send well-trained men to the farms, there to live their lives, there to find their careers, and there to lead in the movements for rural progress. A decade ago it was not easy to find colleges which believed that this could be done, and some agricultural educators have even disavowed such a purpose as a proper object of the colleges. But the strongest agricultural colleges to-day have pride in just such a purpose. And why not? We not only need men thus trained as leaders in every rural community, but if the farming business cannot be made to offer a career to a reasonable number of college-trained men, it is a sure sign that only by the most herculean efforts can the farmers maintain their status as a class. If agriculture must be turned over wholly to the untrained and to the



half-trained, if it cannot satisfy the ambition of strong, well-educated men and women, its future, from the social point of view, is indeed gloomy.

The present-day course of study in the agricultural college does not, however, fully meet this demand for rural leadership. The farm problem has been regarded as a technical question, and a technical training has been offered the student. The agricultural college, therefore, needs "socializing." Agricultural economics and rural sociology should occupy a large place in the curriculum. The men who go from the college to the farm should appreciate the significance of the agricultural question, and should be trained to organize their forces for genuine rural progress. The college should, as far as possible, become the leader in the whole movement for solving the farm problem.

The farm home has not come in for its share of attention in existing schemes of agricultural education. The kitchen and the dining-room have as much to gain from science as have the dairy and the orchard. The inspiration of vocational knowledge must be the possession of her who is the entrepreneur of the family, the home-maker. The agricultural colleges, through their departments of domestic science — better, of "home-making" — should inaugurate a comprehensive movement for carrying to the farm home a larger measure of the advantages which modern science is showering upon humanity.

The agricultural college must also lead in a more adequate development of extension teaching. Magnificent work has already been done through farmers' institutes, reading courses, coöperative experiments, demonstrations, and correspondence. But the field is so immense, the number of people involved so enormous, the difficulties of reaching them so many, that it offers a genuine problem and one of peculiar significance, not only because of the generally recognized need of adult education, but also because of the isolation of the farmers.

It should be said that in no line of rural betterment has so much progress been made in America as in agricultural education. Merely to describe the work that is being done through nature-study and agriculture in the public schools, through agricultural schools, through our magnificent agricultural colleges, through farmers' institutes, and especially through the experiment stations and the federal Department of Agriculture in agricultural research and in the distribution of the best agricultural information — merely to inventory these movements properly would take the time available for this discussion. What has been said relative to agricultural education is less in way of criticism of existing methods than in way of suggestion as to fundamental needs.



*The Ethical and Religious Problem*

Wide generalizations as to the exact moral situation in the rural community are impossible. Conditions have not been adequately studied. It is probably safe to say that the country environment is extremely favorable for pure family life, for temperance, and for bodily and mental health. To picture the country a paradise is, however, mere silliness. There are in the country, as elsewhere, evidences of vulgarity in language, of coarseness in thought, of social impurity, of dishonesty in business. There is room in the country for all the ethical teaching that can be given.

Nor is it easy to discuss the country church question. Conditions vary in different parts of the Union, and no careful study has been made of the problem. As a general proposition it may be said that there are too many churches in the country, and that these are illy supported. Consequently, they have in many cases inferior ministers. Sectarianism is probably more divisive than in the city, not only because of the natural conservatism of the people and a natural disinclination to change their views, but because sectarian quarrels are perhaps more easily fomented and less easily harmonized than anywhere else. Moreover, in the city a person can usually find a denomination to his liking. In the country, even with the present overchurched condition, this is difficult.

The ideal solution of the country church problem is to have in each rural community one strong church adequately supported, properly equipped, ministered to by an able man — a church which leads in community service. The path to the realization of such an ideal is rough and thorny. Church federation, however, promises large results in this direction and should be especially encouraged.

Whatever outward form the solution of the country church question may take, there seem to be several general principles involved in a satisfactory attempt to meet the issue. In the first place, the country church offers a problem by itself, socially considered. Methods successful in the city may not succeed in the country. The country church question must then be studied thoroughly and on the ground.

Again, the same principle of financial aid to be utilized in the case of the schools must be invoked here. The wealth of the whole church must contribute to the support of the church everywhere. The strong must help the weak. The city must help the country. But this aid must be given by coöperation, not by condescension. The demand cannot be met by home missionary effort nor by church-building contributions; the principle goes far deeper than that. Some device must be secured which binds together the whole church; along denominational lines if must be, for a full development of church work in every community in the land.

Furthermore, there is supreme necessity for adding dignity to the country parish. Too often at present the rural parish is regarded either as a convenient laboratory for the clerical novice, or as an asylum for the decrepit or inefficient. The country parish must be a parish for our ablest and strongest. The ministry of the most Christlike must be to the hill-towns of Galilee as well as to Jerusalem.

There is still another truth that the country church cannot afford to ignore. The rural church question is peculiarly interwoven with the industrial and social problems of the farm. A declining agriculture cannot foster a growing church. An active church can render especially strong service to a farm community, in its influence upon the religious life, the home life, the educational life, the social life, and even upon the industrial life. Nowhere else are these various phases of society's activities so fully members one of another as in the country. The country church should coöperate with other rural social agencies. This means that the country pastor should assume a certain leadership in movements for rural progress. He is splendidly fitted, by the nature of his work and by his position in the community, to coöperate with earnest farmers for the social and economic, as well as the moral and spiritual, upbuilding of the farm community. But he must know the farm problem. Here is an opportunity for theological seminaries: let them make rural sociology a required subject. And, better, here is a magnificent field of labor for the right kind of young men. The country pastorate may thus prove to be, as it ought to be, a place of honor and rare privilege. In any event, the country church, to render its proper service, not alone must minister to the individual soul, but must throw itself into the struggle for rural betterment, must help solve the farm problem.

### *Federation of Forces*

The suggestion that the country church should ally itself with other agencies of rural progress may be carried a step farther. Rural social forces should be federated. The object of such federation is to emphasize the real nature of the farm problem, to interest many people in its solution, and to secure the coöperation of the various rural social agencies, each of which has its sphere, but also its limitations. The method of federation is to bring together, for conference and for active work, farmers, especially representatives of farmers' organizations, agricultural educators, rural school-teachers and supervisors, country clergymen, country editors, in fact, all who have a genuine interest in the farm problem. Thus will come clearer views of the questions at issue, broader plans for reform, greater incentive to action, and more rapid progress.

*Conclusion*

In this brief analysis of the social problems of American farmers it has been possible merely to outline those aspects of the subject that seem to be fundamental. It is hoped that the importance of each problem has been duly emphasized, that the wisest methods of progress have been indicated, and that the relation of the various social agencies to the main question has been clearly brought out. Let us leave the subject by emphasizing once more the character of the ultimate farm problem. This problem may be stated more concretely, if not more accurately, than was done at the opening of the paper, by saying that the ideal of rural betterment is to preserve upon our farms the typical American farmer. The American farmer has been essentially a middle-class man. It is this type we must maintain. Agriculture must be made to yield returns in wealth, in opportunity, in contentment, in social position, sufficient to attract and to hold to it a class of intelligent, educated American citizens. This is an end vital to the preservation of American democratic ideals. It is a result that will not achieve itself; social agencies must be invoked for its accomplishment. It demands the intelligent and earnest coöperation of all who love the soil and who seek America's permanent welfare.

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SHORT PAPER

MR. JOHN M. STAHL, of Quincy, Illinois, read a paper before this Section on "Present Problems in Social Science affecting the Rural Community."

## SECTION C — THE URBAN COMMUNITY





## SECTION C—THE URBAN COMMUNITY

(Hall 5, September 22, 10 a.m.)

SPEAKERS: PROFESSOR J. JASTROW, University of Berlin.  
PROFESSOR LOUIS WUARIN, University of Geneva.

### THE RELATIONS OF THE URBAN COMMUNITY TO OTHER BRANCHES OF SOCIAL SCIENCE

BY J. JASTROW

(Translated by Professor Charles W. Seidenadel, Ph.D., University of Chicago)

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If we want to gain information about the relations of the subject of this paper, the urban community, to kindred sciences, we proceed in the easiest way by considering that the urban community has three other communities beneath itself, above itself, and at its side: beneath itself the family, above itself the state, and at its side the rural community.

#### I

Wherever an urban community formed itself, it found the already existing family; by this fact it has been directed in its development. Nowhere is the urban community an original community grown out of individuals, but it is everywhere a coalition of existing social formations. The formation of a higher order is determined by the elements from which it has grown. And even to-day, after the urban community has long ago attained to independent activity separated from the family, the influence of that origin is still evident in the selection of the objects of its activity. Perhaps there is no country in which this dependency is more apparent than in Germany.

The principal objects of activity of a German urban community, *i. e.*, those which bring the greater part of the citizens, either actively

or passively, in contact with the community and which characterize the urban community, are the school and charities. Both are an integral part of familiar activity.

The school originated when a part of education, instruction, was separated from the family and instituted for several families in common. The municipal school is an institution established for the purpose of making this part of education common to all families of the city (or to make the common education possible). As long as the families paid school fees according to the number of the children using the school, the public school was a common institution of all participating families. Where the fees are abolished this connection is dissolved and a part of the familiar duties have been transferred to the community. But now the different parts of education are so closely connected that no part could be separated from the whole without drawing other parts along. Even the school libraries which furnish the pupils reading material in their leisure hours recognize that the child is, in a certain measure, under their supervision and care during the time in which it does not go to school. Since not only mental but also physical culture is the object of instruction, and since special stress must be laid upon this in accordance with the old saying "*mens sana in corpore sano*," also the care of the body becomes a part of the activity of this institution. The cities begin, therefore, to connect baths with the institutions (*Schul-brause-bäder*), and the sanitary supervision, in the hands of school physicians, is performed from the higher point of view that in a country with universal education this supervision gives the best opportunity to review the sanitary condition of the future generation and to prevent, at least with good advice and little remedies, the diseases of eyes, teeth, etc., on which the necessary care is not bestowed in the families, as experience has shown. Free instruction contains the recognition that the community has taken up this part of education instead of the family. From this the deduction is made that the community must furnish not only the common means of instruction, but also the individual means for every child, not only the means of teaching, but also of learning. To a certain degree an agreement in this much-disputed demand has been reached, inasmuch as it is considered to be, under all circumstances, the duty of the school administration to provide children with school-books. There is still a controversy whether this provision shall become general or shall be confined to the cases of poor families (more expressly: whether the provision of school-books shall be general or subsidiary). If, according to the Latin proverb, "*plenus venter non studet libenter*," — a full stomach is not inclined to study, — certainly an empty one is less capable of it. The impossibility to instruct hungry children urges the necessity of feeding the pupils; it is done as a formal school

institution (in Switzerland, and in Norway) or in connection with charitable societies, as is preferred in Germany. This development is spreading fast. Now the needs of life urge to proceed from feeding of children also to clothing them (to furnish shoes in mountainous regions); now the apparently useless recreations which make life more enjoyable cause play and sport to be added to instruction; they open an infinite space for the extension of the school to activities which had formerly belonged to the family. In no country of the world is this more evident than in America.

But also in other respects the activity of the urban community of the public school draws its objects from the family. Formerly the family itself had been the school for the education of the girls; the daughters received their education for their duties as mother and wife by their activity in the family. The more the family is dissolved by the drift of the women to the trades, and the more the home education is impaired, the more the family is in danger of losing that important historical connection which is founded upon the tradition of the mother to her daughter. Here the school appears as a remedy, as it offers instruction to girls in domestic science for their future activity in the family.

The familiar origin of urban activity shows itself also in charity, in a different way but not less clearly, either in public institutions for the poor or in the care for the poor in their homes. In either case urban charity has the same object as the care of the family for its members. Only in one instance the activity of the family is entirely replaced; in the other it is supplemented; this difference determines the two systems of the charity administration. English charity, a large indoor relief system, gives every one who does not find in the family what life demands, a compensation, but it demands (at least according to the rules) that the poor give up his family and move into the urban poorhouse; only exceptionally he is supported while living within the family. The opposite system is followed in Germany: as long as it is possible, the poor is permitted to remain in his abode, and urban charity furnishes only the necessary additional support; only in exceptional instances, if no other way is possible, is the poor separated from his family and sent to the poorhouse. But in either system familiar duties are transferred to the city. It would be a mistake to believe that this development is confined to those countries in which legislation recognizes the obligation of charity. There are no longer any large cities without public charity, whether legislation urges it or not. France is considered the classical country of exclusively voluntary charity. But while French legislation has not mentioned expressly the obligation to establish administrations of charity, it has instituted obligatory branches of charity for a great many special cases, so that France

surpasses, in many respects, even the countries with obligatory charity; and where charity is voluntary, it is voluntary not only for the individuals but also for the communities, the largest of which have gone farthest in performing voluntary charitable duties. In the United States of America, where there is no uniform system and where all intermediate degrees from strictly voluntary to completely obligatory charity exist, the necessity of uniform administration appeared most urgent in the urban centres of population. As London has set an example by its *Charities Directory*, so did New York with the great idea of the local concentration of its charitable institutions. A constantly growing circle of private, of familiar activity occupies itself with charity, by rising from the idea of removing existing need to the higher idea of preventive charity. Thus the administrations of charity either endeavor to improve sanitary conditions as sources of pauperism, or they attempt to diminish the lack of employment and occupation by caring for finding work more easily, by erecting small houses at the right time in order to prevent the ill effects of abnormal high rates of renting, etc. With all these aspirations charity does not create any new objects of its activity, but it selects certain activities from those of the family which are appropriate for the wide circle of the community. Charity is the intermediate stage through which a number of activities pass in order to be taken out of the hands of the family and to be performed at first only under compulsion of necessity and in a provisory manner, and later to become a problem of enormous significance.

For example: To procure a dwelling is the matter of the family. A place of refuge for the homeless and the inducement to build little cottages when no houses are available is a provisory assistance through charity; the policy of land and of home is a great modern communal problem.

While school and charity demonstrate, especially by the example of Germany, that the sphere of communal activity is determined by the condition that the authority finds everywhere the family, yet a number of other urban problems represent activity taken from the family, as water-supply and canalization. Often it is said that the modern technic has not done anything to facilitate housekeeping, since the wife stands even to-day at the primitive hearth and must work with the same primitive utensils which her great-grandmothers and their ancestors had possessed. But in those days housekeeping comprised also carrying water into the house and removing the garbage. To-day it is difficult to imagine how in high apartment houses the burdens of housekeeping could be overcome, if these two functions had not been taken by the urban community from the family. And this transition was accomplished so thoroughly that it



is not even noticed, because it does not occur any more to any one that the powerful accomplishments of modern technic in water-supply and canalization are only common activities of housekeeping.

## II

As the little cell of the family exists beneath the urban community, so there is, above it, the great encompassing circle of the state. (Department 20, Section C, "National Administration"). Here, however, the features of a uniform typical picture cannot be ascertained; but two absolutely different cases must be distinguished: First, the state, extended over wide areas which needs a division into provinces for its own purpose. Even if a subdivision is made, the smallest district will still be apt to contain several settlements. By mere self-division a state does not yet attain to formation of communities; an urban community cannot be spoken of, because there does not exist any local community. In this wise, we must think, the old division into counties and hundreds in entire western Europe was made in the epoch when the Roman-Germanic states were constituted. If in reality sometimes the smallest district, the hundred, coincided with a settlement, it was a mere accident. This can still be seen in countries where the constitution of the parish depends upon geographical division. Even the smallest district, the parish, comprises the parochial village with the filial villages. By accident the entire parish may be one settlement, no more nor less; but usually either the parish will comprise several settlements, or a large urban settlement will be divided into several parishes.

The opposite extreme we find, if the community itself is the state. The classical example for this city-state is Athens. Here the commonwealth has never been anything else but the community of the Athenian citizens. The market-place where they assembled to discuss the affairs of their community and their environs remained the centre in which the most important affairs of an insular empire were decided, whose members are considered only allies of the Athenians. In a greater measure the same was repeated at Rome. The city of Rome remained the Roman commonwealth (*republica Romana*). Only he who possessed citizen's rights in this city was a citizen of the empire. In order to appease the revolting Itali, who wanted to have their share in the government, no other means could be found than to grant them citizens' rights in the city of Rome. And the unity of the empire, as it was understood since Caracalla, was only founded upon the fact that every inhabitant of each province of the far-spread empire was simultaneously a citizen of the city of Rome. While city and family stood in close relations from the very beginning, the relations between state and city cannot



be traced on those distinctly visible natural lines which pointed out the ways to the statesman.

The embodiment of free urban communities into a firmly organized state is a problem. An important part of the difficulties in the structure of the administrative organization of the different states has to deal with this one problem. How difficult it is to comprehend, in this regard, national peculiarities is shown especially by the various, partly contrasting opinions which can be heard, in a foreign country, about the condition of the urban communities of Germany.

Frequently one finds there the notion that a free civic activity does not exist at all in Germany. This conception was formed in consequence of certain occurrences in German urban life which have gained publicity and attracted greatest attention. These were cases in which the government of the state had not sanctioned the elections of mayors and members of the magistracy. Of foreigners who have spent some time in Germany, especially of Americans, one hears quite often the opposite opinion, that they were astonished by the great, free, and fruitful activity of citizens' spirit which they recommend to their own countries as an example. In reality, either conception is correct; there exist limitations for the German cities which are unconformable to citizens' self-administration and, as the experience of other states shows, unnecessary for the purpose of a firm state organization. But there remains, nevertheless, a considerable space for free activity, for great aims. However conscious we must remain in Germany that we have to strive after the improvement of the position which is prescribed to the cities in the state, yet we are not forced, in view of this need of improvement, to decline the favorable judgment of the foreign nations about the accomplishment and partly also the organization of our cities. We must not believe that the difficult problem of the embodiment of the free city into the German state organism has been solved; but we may probably accept the complement that a remarkable attempt is made in this line. The difficulties to be considered can be clearly seen from history.

From the thirteenth to the sixteenth century the urban development of entire western Europe bears that bold feature of autonomic expansion of culture and power which we have seen in the ancient "city-states" of Athens and Rome. The history of Italy consists almost exclusively of the history of its urban communities. If Milan sacks Lodi and Como, this means that in its realm no other citizen's right shall exist besides the Milanese. At the time of the Crusades, Genoa and Venice founded a circle of settlements around the eastern part of the Mediterranean Sea which had their common government in the city authorities of Venice and Genoa. The same was the case when in Spain the urban community of Barcelona took

an equally independent position by which it was enabled to establish its own maritime law and to spread it among all maritime nations; when the Provençal and French cities, at the time of the great wars with the English kings, appeared as independent powers, and when in Germany Lübeck and its allies engaged in northern European politics with the supremacy over Scandinavian empires. In Germany the development was furthered by the assumption that the monarch, by virtue of his imperial title, was at the same time the lord of the world; even the recognition of their belonging to the empire did not, therefore, diminish their independence. This period of the independency of the cities was followed in Germany by an epoch (about from the sixteenth to the eighteenth century) of rising princely territorial power which forced the cities into the greater organism, justifying their despotism by their utility. In a third period beginning with Stein's municipal order (*Stein's Städteordnung*) an attempt is made to reanimate the free forces of the citizens and to retain them nevertheless in connection with the state. In four years Prussia and Germany will celebrate the centennial anniversary of this law enacted in 1808; but we stand, nowadays, still in the midst of the attempt which had then only been begun.

The relations between city and state go far beyond politics and administration; it is only a section from the problem of the relations between large centres of population and the community of the people. As an example of the influence of a capital upon the entire country, always the position is mentioned which Paris holds in France. Not only the three great French revolutions have originated in Paris, but also literary taste, theater, painting, sculpture and architecture, the fashions are dictated to the country by Paris. The very contrary relations exist in America. The founders of the Union have placed the seat of the government in a city which should be nothing more but the seat of the federal authorities. And, although Washington has developed, contrary to the intentions of its founders, into a metropolis and enjoys to-day the just reputation of being one of the most beautiful cities of the world, yet this urban community has never been of much political importance in the history of the Union. Its inhabitants, excluded from the right of voting, are rather bound to let themselves be ruled than to claim predominance. While in the position which Paris takes in France there is still a faint remembrance of the ancient city-state, Washington represents the strongest logical contrast. Also in the whole intellectual life of the American people there is no movement that has taken its issue from the population of Washington.

## III

The urban community which has beneath itself the family and above itself the state, has at its side the rural community. Although much has been written about the difference between urban and rural communities, yet the simple truth should not be forgotten that the natural difference between city and village is in their size. That the city is large and the village is small, nobody will dispute. Only in the question where the limit shall be drawn, the opinions differ. Frequently it is said that only the metropolis, cities with more than one hundred thousand inhabitants, are real cities. This opinion imparts to the word "city" a significance that never before had been attached to it. If the languages of all peoples have formed the word "city" without thinking of a large city, there must be something which the smallest communities (that may still be named cities) have in common with the largest centres of population and which, at the same time, separates them from the still smaller places, the villages. It is not difficult to find it out. One needs only wander from village to village, for a few weeks, and then arrive in a town of two to three thousand inhabitants in order to become aware of the difference. There one can find shelter only through a villager's good will or be received hospitably by some one who only occasionally accommodates a transient stranger, though he is not a professional hotel-keeper. Here one finds regular hotels which provide for the stranger. There it is difficult to find a servant who can do the most necessary repairing of clothing, and, in emergencies, as sickness, one is helpless. Here one finds tailors, shoemakers, physicians, druggists, etc. The city begins with the division of labor.

In this point our subject does not only approach the subject of industrial common life (Department 22, Section D, "The Industrial Group,") and economic history (Department 19, Section A), but also the whole large group of social culture (Division G). I shall add some words about the manifold relations of urban life to social culture. In social regard the city differs from the country in two points: the *few* inhabitants of a village are, generally considered, *homogeneous*; the *many* inhabitants of the city are *dissimilar*. These combined factors give the urban community its importance in the cultural movement.

In the programme of this Congress under "Social Culture" the topics "Education" and "Religion" are discussed. Of the first group, Education (Department 23), we have discussed at length one of the most important points, the School (Section B), as an example to show how the urban community takes its tasks from the familiar community. The school is certainly not an urban, but just as well a

rural institution; it belongs to the urban community not because this is a city but a community. But no other example demonstrates so clearly that the solution of the cultural problems of the community is really reached except in the urban communities. Also in all other points of this Department (23) the enormous urban influence becomes manifest. The educational theories originated in cities. The two great founders of modern pedagogy, Rousseau and Pestalozzi, have sprung from cities. The universities can, in their modern organization, be traced back, in Europe as well as in America, to the model established by Bologna and Paris, centres of urban culture. The numerous foundations of universities in the fourteenth and fifteenth centuries were made exclusively in cities; they represented the reaction against the older, monastic, world-shunning learnedness, as also only those monastic orders took hold of them, which in the two preceding centuries had sought their seats not in rural loneliness, but in the cities, and were supported there by the people, the beggar monks, the mendicant friars.

If we call the cities centres of culture, we want to express, of course, that they shall not wish to retain their acquired possession of culture. The city acquires cultural treasures, but only in order to let them radiate and in order to begin, thereupon, the work again on new materials. Its educational work is a constant renunciation of acquired privileges. This is shown especially clearly in America in the history of the library movement. This movement has begun especially in the cities. First it was the ambition of each city to surpass the country by the possession of a public library, accessible to everybody. To-day it is the ambition of the cities to induce the country to follow their example. On my wanderings through small towns on the coast of Massachusetts I have visited, in each place, the public libraries, such as in no European state have been carried out into the villages.

The country can, however, claim for itself a certain superiority in religious culture (Department 24), much rather than in education. The development of Buddhism proves that rural solitude and contemplation are able to imprint their stamp upon great world religions. But Christianity shows the influence of urban culture. Though the origin of Christianity may be found in the synagogue of Capernaum, a little community, almost more rural than town-like, that was so poor that it had to accept its house of worship as the donation of the foreign captain, yet the work of the founder of this religion attained to its penetrating significance only when He stepped upon the soil of the city. And this fact lives still in tradition so powerfully that it is scarcely comprehended that Christ passed but few days in Jerusalem. The founder of the Mohammedan religion was a merchant, and even in the oldest doctrines of Islam the interest



in communication becomes evident. The connection of religious and urban culture is shown also by the fact that a sanctuary and sacred place to which the processions of many pilgrims are directed bears in itself the germ of an urban centre; not only Mecca and Medina, but also the Parthenon and Capitol, the height of Zion, the medieval Rome, and the multitude of bishops' seats in all European countries. And even if, now, we want to designate the life after death with a worldly metaphor, we do not select any of those steads, removed from the world, which have induced lonesome men to contemplative meditation about the last truths, but we select even now the idea of an urban community and we speak of the "heavenly Jerusalem."

The universal cultural significance of the urban community is also expressed by the secondary meaning which the expression "urban" has in various languages. As in classical Latin *urbanus* and *rusticus* point out the difference between higher and inferior culture, so the word "urbane" is still used to denote refined manners, contrary to boorish manners. But we find also, in languages, traces of that mission of the city to spread culture and to gain advantages only in order to let others partake of them. From the city the word "citizen" is derived, as "burgher" from burgh and borough, and *citoyen* from *cité*. But after the citizens' rights and duties had been placed in relations of more general validity, they were transferred to the larger community.

The notion of the citizen is probably the most important contribution made by the urban communities to modern political culture.

### *Literature*

My treatise occupies itself merely with the formal character of the urban community. Only through examples has it been shown how its formal peculiarities find actual expression. To treat exhaustively this part of the subject it would be necessary to discuss all branches of urban administration. But this is the subject of a special theme (Department 20, Section E, "Municipal Administration"). By means of the different branches of administration the doctrine of the urban community is connected with each human discipline whose object can become in some way the object of administration; hence not only, as has been shown by an example, by means of the school administration with the entire pedagogical science, but likewise by means of the sanitary administration with medical science (Department 17), by means of the administration of buildings and ways with the entire science of engineering and architecture (Department 18; *cf.* the example of water-supply and canalization), by means of the administration of transportation and economics with political economy



(Department 19), etc. All these connections are left to Department 20, Section E, which, in a certain sense, runs parallel to this section. But in the following review of the literature I shall consider it at least so much that a bridge is formed for the investigator.

German literature on urban community is split in three literary directions, that exist side by side almost without mutual contact: the historical, juristic, and administrative.

Historical literature, especially the literature on the origin of the German municipal constitution, is very copious. Into the hypotheses concerning this origin Heusler attempted to bring light by his orientating treatise. Although more than thirty years have elapsed since, this orientating treatise is still indispensable. (A. Heusler, *Der Ursprung der deutschen Städteverfassung*, Weimar, 1872.) Doch muss für den gegenwärtigen Stand der Forschung hinzugenommen werden: K. Hegel, *die Entstehung des deutschen Städtewesens*, Leipzig, 1898. The extraordinarily large literature on the development of single German cities is collected in the section *Städtewesen* in Dahlmann-Waitz, *Quellenkunde der deutschen Geschichte, Neubearbeitung von Altmann und Bernheim*, Göttingen, 1904. The German history which describes adequately the influence of city and country is: K. Nitzsch, *Geschichte des deutschen Volkes bis zum Augsburger Religionsfrieden. Nach dessen hinterlassenen Papieren und Vorlesungen herausgegeben von G. Matthäi*, Leipzig, 1883-1885.

The German juristic literature on municipal law is influenced especially by the fact that the most prominent German thinker who made the legal relations between state and city the object of his studies made only occasional scientific remarks about Germany. This is Gneist, in whose works the investigation of English conditions is treated almost exclusively. Thus the juristic literature has remained in the hands of officials. The juristic literature on the position of the cities within the state organism reproduces especially the opinions of governmental bureaucracy expressed in ministerial rescripts, etc.; the municipality yields to these opinions now unwillingly, then unconsciously. Also the more liberal teacher of state law is under this influence. In Rönne's *Preussisches Staatsrecht* this subject is not treated by the author, but in an additional volume: Schön, *Recht der Communalverbände in Preussen*, Leipzig, 1897. Only lately new life has been brought into this state literature, as the juristic side of municipal constitution was regarded from the urban point of view. Preuss, a student of Gneist, is at present the only teacher of state law who follows this direction. Preuss, *Das Städtische Amtsrecht in Preussen*, Berlin, 1902.

The administrative and social literature starts, in Germany at present, with the numerous attempts of reform of different parts of urban life, which are being made in almost all German cities. How-

ever, it might suffice to point to the results which we owe to the great German municipal exposition of 1903. The administration of almost all important cities of Germany had united for this purpose. The exposition was held in Dresden where, during the preceding winter, the *Gehe-Stiftung* established a course of lectures in which an historian, a geographer, a statistician, a political economist, a philosopher, etc., should each express his opinion about urban culture. The lectures have been collected and printed in the *Jahrbuch der Gehe-Stiftung*, 9 Bände, *Die Grosstadt, Vorträge und Aufsätze von Bücher, Ratzel, v. Mayr, Waentig, Simmel, Th. Petermann, D. Schäfer*. After the close of the municipal exposition its president caused a large work to be compiled about each of the different sections; this book may be considered a synopsis of the latest progress in the different branches of German municipal administration; its author is Wuttke (Dresden, 1904). Finally the pamphlets which the city of Dresden had distributed at the exposition and in which the various branches of administration were described offer an intelligible introduction into a municipal administration which can serve as an example. (*Führer durch das Verwaltungsgebiet der Stadt Dresden*, 1903.)

Most German municipal regulations prescribe the annual publication of an administrative report. The city of Berlin goes beyond the legal obligation and publishes besides these annual reports quinquennial statements of acknowledged excellence. Where the putting in print was not usual, even this has been of advantage to literature, as in the first edition a comprehensive review was given. In this way the first administrative report of the city of Essen contains an introduction into the development of modern municipal administration. (*Die Verwaltung der Stadt Essen im 19. Jahrhundert*, 1 Band, *Verwaltungsbericht erstattet von Oberbürgermeister Zweigert*, Essen, 1902.) Schoeneberg, one of the quickly risen suburbs of Berlin which had been a rural community until lately, at the time of its admission to the immunities and privileges of a town, published an exhaustive and retrospective report of its administration which describes the development of a great urban community (1899). In connection with the bicentennial jubilee of the city of Charlottenburg, in 1905, the same subject will be treated, upon a broad historical basis, in Gundlach's work (under the press) *Geschichte der Stadt Charlottenburg*, Berlin, 1905; the entire modern municipal administration will there be discussed. Finally I should like to call attention to the fact that I have taken the examples in the first volume of my work *Sozialpolitik und Verwaltungswissenschaft*, Berlin, 1902, mostly from the modern municipal administration of Germany and foreign countries.

# THE PROBLEMS OF THE URBAN COMMUNITY

BY LOUIS WUARIN

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THE causes of the rural exodus and the rapid growth of cities, which form the characteristic feature of our times, are familiar to every mind. Though numerous, they can, in fact, be reduced to the appearance of steam and then of electricity as practical means of mechanical power, motion, and communication.

Should these two forces be ever suppressed, things would be reversed and come back to their primitive condition, but they are permanent and insuppressible agents. We must, therefore, expect to see the great demographic revolution continue its course, notwithstanding the amazement mingled with anxiety as to its ultimate results which it awakens.

The era of scattered population has definitely given way to that of agglomerated population. Every reasonable man ought, at every turn, to reflect on the best way of facing new situations; now it is but the bare truth to say that the public are painfully indifferent to problems of vital importance. It is evident, for instance, that cities, their future development and necessities, have not received proper consideration. Have not most of them grown unrestrained and without order, so as to become a dread to thinking men? Grievous, irreparable blunders have been committed; errors more deplorable still will be added to these, if we are not on our guard. Then the question arises: "What shall be done to avoid the disastrous results of these shortcomings?"

It has been my privilege, after a long search, to discover the city of the future. A worthy friend, Initiator, helped me to see it thoroughly. All that I saw filled my mind with a kind of rapture, and roused my indignation at the deplorable apathy in which most of the modern cities remain as to their supreme interests. Indeed, I had a clear sense of the needs and responsibilities of the present hour, and consequently felt justified in accepting the flattering invitation, for which I thank you most heartily, gentlemen, to come to St. Louis to speak about the urban community.

## I. *Moral Reforms*

Great was my impatience on entering the city of the future to get new light about the material conditions best fitting our agglomerations. I was, perhaps, too sanguine about the result of my inquiry,

for Initiator stopped me a while and pointed in another direction. "Your strictures," said he, "about our modern cities are correct; still allow me to observe that housing the body is not everything, housing the soul requires consideration.

"Not long ago cities in general were held in bad repute. They were dreaded as hot-beds of agitation, for the citizens were constantly clamoring to obtain broader liberties. This danger is now removed. On the democratic basis they lead or follow, according to circumstances, and have no other will than that of the nation as a unit. Still, if the political revolutionary era is closed, other terrible perturbations have followed which, as a rule, take place again in crowded cities. We allude to the economic conflict, to the labor wars which are called strikes. These alarming feuds rapidly degenerate into everlasting struggles between fratricidal factions. Such a state of affairs must be remedied. And how can this be accomplished? To put it briefly, by justice and liberty; but justice and liberty are handicapped both when workmen are denied the right of joining trade-unions and of giving voice to their political or religious opinions, and when employers are denied the right of taking non-union as well as union men.

"Moreover, justice and liberty are imperiled when strikers interfere with the work of non-strikers or maliciously invade the premises of dissenting employers. Such trade-unions as exist in England will, in the opinion of the best judges, become a social safeguard, and the day is not far off when workmen will consider violence as hurtful to their cause, for a lasting change can only be brought about when public opinion backs it, since the laws take their stand on actual conditions of life and not on artificial devices.

"A committee of control and arbitration should be intrusted with the duty of adjusting the difficulties that may arise between employers and employees, of warding off violations of contract, and providing for full publicity to be given to the claims of both parties. Let me repeat that public opinion must be considered as the supreme tribunal. The New Zealand arbitration committee, whose decisions are compulsory, has a tinge of absolutism which may threaten both justice and liberty.

"Many people in comfortable circumstances are apt to be one-sided. They believe that men on a strike must necessarily be agents of disorder, to be brought to better feelings by the police and the army — a foolish view, for the way that leads to peace, in spite of a dangerous old proverb, is not war, but peace. In times of peace, let us then strive to reconcile economic antagonisms.

"There are also methods of making money which are responsible for much evil. I have not in view only mischievous trusts; cases have occurred where labor organizations have joined hands with employers and had work done at abnormal prices. The benefits



stealthily obtained are shared between the conspirators, who thus oblige the public to purchase articles at an advanced price. There remains much to do to found an effective economic order resting, so to speak, on axioms which would be received as those on which modern democracy has been established. The present economic order of things is still often blurred by the stain of its origin, for it was drawn up by the privileged classes. Let democracy also come here and put things aright. The rule of life is reciprocity, Confucius says, and the gospel upholds the same principles."

Thereupon Initiator denounced another peril. He insisted on the duty to fight systematically against the demagogues who but too often succeed in imposing upon a community their disgraceful tyranny and forming a state within the state. "This grave problem," he asserted, "is not solved by intermittent fits of indignation. All the energy of good citizens should be employed to thwart the rascals, whose only aim is to take possession of power and then divide the spoils and to make allies by corruption and unworthy promises. The domination of such men is spreading its pestilential effects in all directions. To support them in any way, even by remaining indifferent in their presence, is a crime. But let it be remembered that the institutions which have permitted the politician to burrow his way into our public administration, like a rat into the floors of old houses, have to be remodeled according to the fruits of experience. And here we would like to have the following measures taken into consideration:

"*First.* State supervision over local boards, for self-government, however desirable, may be abused by astute men ready to shout: 'We are masters here, close the doors!' And again a detailed publication of municipal accounts wherein the sums paid and the names of the persons receiving them are fully stated. This would not be a superfluous incumbrance.

"Extension of the principle of direct democracy are represented by the referendum, the popular initiative, and, last but not least, proportional representation, this reform being the principal instrument for the regeneration of public life. Besides, there ought to be compulsory voting and an extensive local option for various issues.

"Finally, the starting of an independent press ready at any time to expose and break abominable rings."

"The supreme task," Initiator continued, "will consist in stimulating morality. There are holy crusades to organize against drunkenness, gambling, libertinism, obscene literature, the demoralizing theater. Every effort is needed to develop institutions, secular and religious, official and private, all associations which aim at propagating instruction, education, a taste for wholesome pleasures conducive to good health, both physical and moral.



“‘Jean Jacques, love your country,’ said Rousseau’s father to his son. This should be our motto. We look with suspicion on globe-trotters whose country is nowhere. The soul, the soul of the city, I tell you, should be looked after in the first place.”

## II. *Material Reforms*

“(a) *General Principles.* But since you have come here especially to investigate the material structure of our city, a walk through the streets will serve as a practical lecture on the subject,” continued Initiator, and we then began to visit the new city. As we went on along wide streets broadening into squares or across gardens and crescents enlivened by unexpected vistas of sky, our guide enlarged on the principles which have inspired the founder of the up-to-date urban agglomeration. I was amazed both at the simplicity and the grandeur of the scheme.

“Plenty of air, and sun for everybody! Air, an abundance of air, everywhere! Down with stuffy buildings! Light and air are primordial necessities. The sun brightening dwellings and streets, even the humblest of huts! Let us benefit by the progress of science! We know now upon the best authority that a dwelling deprived of light is predisposed to be the receptacle and the nursery of pernicious microbes. Among them there will be found the germ of tuberculosis, the most terrible plague of modern times, causing more victims than war and cholera together. An Italian proverb says that where the sun does not go, the doctor surely will. Air and sun! this is the problem in a nutshell, but great difficulties had to be overcome. Our end could not be attained without a considerable outlay of money. Well! there is no reason to regret the expense, which proved an excellent investment. A badly built city means a superabundance of invalids and an increase of the death-rate. Therefore, from a business point of view, a sacrifice of money to the public health is a saving to the public purse. Prevention is better than cure.

“In our city, as in all towns, the ancient part stands shoulder to shoulder with the modern quarters. It was not easy to harmonize these two parts so different one from the other, and our success has as yet only been partial. At all events, we have done our best to prevent the old quarters from becoming more objectionable, by improving them as much as possible. First of all, we have drawn up a plan of rectification which we are gradually working out to the best of our ability. Our municipal authorities buy up numerous houses situated on the lines of projected streets and especially those which pay a fair interest. With the sanction of the law, we appropriate others at fair prices. Indeed, according to our improved regulations,

the prices paid are the real value of the houses. At the same time, we forbid the letting of unhealthy tenements, as we forbid the sale of poisonous mushrooms, and here is the result. Some house-owners whom we compel to repair their houses prefer to sell these to the town or to builders who will hasten to demolish them. Thus, sooner or later, the plan of rectification will be carried out, the filthy buildings being either reconstructed or removed for widening the street or the square. Such is our method of rational transformation.

"Our old quarters require a plan of rectification, the new ones one of extension, stating how they must be laid out and comprising the streets, the public gardens, the parks, the athletic grounds, the future schools, hospitals, and other official buildings. The area of the open spaces is always in proportion to the importance of the quarter they are intended to serve, and we endeavor to have many of them rather than a few big ones.

"The building of the federal city, now Washington, under the inspiration of the French engineer, Major L'Enfant, has been to us an object-lesson. The thoroughfares and streets were traced according to 'celestial observation,' says the original plan of 1792, so as to assure an equal distribution of the sun's rays between the two sides of houses. We do not exactly follow the directions N-S, W-E of the compass; in drawing our streets, where we have more freedom of action than in laying out avenues (these being often a result of circumstances); we take the line N-S with an inclination of 19 degrees toward N-S — S-W. Roman cities, as archeologists assert, already presented a fixed orientation.

"But the crucial point of our campaign was reached when we had to draw up our Building Code. We were met by violent prejudices. We insisted on limiting the height of houses as a primary condition of health. Being requested to make an exception for the business quarter, we turned a deaf ear. We remembered having seen elsewhere in 'sky-scrapers,' offices situated above the tenth story, where gas or electricity was needed at mid-day. We declined to consider modifications of any kind. Had we proposed setting the quarter on fire every twenty years, we would not have elicited a more indignant outburst. What? No sky-scraper? And why? And how? Are they to be doomed in cities where land is worth its weight in gold?

"We believe that the exorbitant price of city land is the outcome of the free hand given to builders, that if lower houses were the rule, houses would, nevertheless, be required and found, and that if land went cheaper, the calamity would not be a national one. We were surprised to find citizens in favor of houses whose height is injurious to the public health. We could not help exclaiming in our turn: 'And why? And how? What should we be guided by? Private or public interest?'

"Our opponent maintained that our exacting ordinances would put a stop to city building and cause the rents to rise enormously, thus terribly cramping the working classes. 'Well, be it so,' we answered. 'In that case, both the outskirts of cities and the neighboring country where land is less expensive will be utilized; suburban villas will be built, a result which is highly satisfactory. Indeed, it becomes more and more apparent every day that large cities with their railroad stations, their ports, their proximate canals, their market-place, their exchange, their workshops and their warehouses, are destined to become, in the course of time, business centres. The tramway enables their inhabitants to have a dwelling-house at some distance and there quickly to enjoy the open air in the midst of nature.' This reasoning seemed to be acceptable, and we need not add that the building spirit has not in any way suffered. On the contrary, the same rule that made order prevail in the growth of the city has given it fresh life. The thing is plain enough. A great contractor pointed out to me that if our buildings are not as high as some would have wanted them, our houses at least, thanks to the existing laws, are not liable to be depreciated by the enormous and brutal sky-scraper. The tenements of the city being less numerous, we obtained higher rent for them, the more so as many of these, provided with lifts, are used as offices and command larger prices than ordinary flats. If building technicalities are sometimes rather aggravating, we accept them, however, in consideration of the benefits derived from them.

"Our Building Code has proved a decided success. We have gone into minute details in order to defeat the objections that were raised against the system. Just one or two instances. In new houses we have fixed the height of the façade cornice, but having heard that in other cities builders evaded this rule by constructing a kind of second edifice above the regulation cornice, we have determined also the conditions of structures for the roof itself.

"And again, a small paragraph in our code, like a snake in the grass, would have made it possible for the authorities to infringe the code itself. We did not permit the introduction into it of exceptions to the stated ordinances. We were opposed to such sentences as this: 'However, in certain cases the authorities will have a right —' well, not to submit to the law. We have avoided giving *carte blanche*. Why should the public powers be authorized, not to say encouraged, to do the reverse of what the code established?

"To sum up: three leading interests have inspired us in drafting our legislation for the city of the future: sanitation; public safety; beauty.

"(b) *Sanitation*. Streets drawn according to the compass, as has been stated, are favorable to sanitation, but further dispositions are

also required. While we approve of spacious courtyards with bedrooms in the back part, in order that sleepers may be protected against the noise of the circulation, we disapprove of those suffocating pits the occupants of which are condemned to inhale impure air coming from the kitchens and the lavatories. When compelled by circumstances to tolerate these narrow courtyards, we have done our best to ventilate them. To prevent abuses in the line of insufficient yards, we have made the dimensions of lots such as to permit of a good-sized-yard or no yard at all.

"We have also taken measures to prevent there being narrow side-streets and awkward lanes, windowless servants' rooms, underground porters' lodges, miasmatic and microbic alcoves.

"We have an eye to doors and passages, to the proper height of ceilings, to honest work in all the details of the buildings. More than once we have put our veto on buildings whose contractors tried to elude our rules. We supervise the laying down of sewers, water-pipes, gas and electricity in houses, all of which, if badly done, may be dangerous to the tenants. Intelligent architects and builders understand and back our regulations, thereby increasing their credit and patronage."

Initiator begged me to notice a tablet fixed on the walls of a newly built house; it bore the name of the architect, the builder, and of the municipal officer who authorized the building to be constructed. He also pointed out to me another house full of blunders. The men who built it were tabooed by public opinion, and the municipal magistrate responsible for its existence was deemed unfit to occupy his post and not reelected.

"Perhaps you take it for granted that we do away with the skyscraper. By no means; but it is true we allow it only in streets or places too broad to be injuriously overshadowed by its immense size. Besides it is bound to be incombustible, and we command it to be constructed of genuine fireproof materials. It is known that shrewd speculators have more than once helped the erection of the mammoth house with no other purpose than to retain the business centre on land which they own and to which they confer, by so doing, a great additional value. Why should we encourage such schemes?

"Neither do we neglect a supply of the purest drinking-water. Within a few years we have entirely eliminated typhoid fever, the result, as a rule, of contaminated water. The frequent breaking-up of the streets for underground municipal work is an unhealthy and costly necessity which may be avoided, as will be explained later on.

"Our parks and public squares are our glory. Rich citizens occasionally contribute to their enlargement and to their maintenance and are rewarded by the gratitude of the inhabitants. English-



speaking people justly qualify these oases as the city's lungs. Besides trim gardens, neat lawns, shady avenues and clusters of trees, we have borne in mind the requirements of sport. We have reserved a playground which is useful for every kind of game and out-of-door amusement. Nurses and their babies have at their disposal sand-heaps near water-basins filled with gold and silver fishes. The picnicking public feels at home here. A refuse-box is near at hand, where are thrown the remains of their repast, such as paper, tins, etc. Untidy individuals are called to order by the keeper of the place. Ill-behaved people must be trained by law, a principle justified by experience.

"But how prevent the crowding of these pleasure-grounds? This eventuality is not to be feared in view of the fact that many people of every class, having their own pleasant home in the suburbs, make but little use of public places."

"You must admit," went on Initiator, "that towns provided with rural suburbs are a great blessing. Well, let us look at our pretty suburbs. See the outskirts of one of them covered with peaceful little houses of varied styles. Behold the sweet scenes, charming terraces, vegetable and flower gardens, a clear fountain, friendly birds flitting about the trees and the eaves. Many are the houses, but no giant house is to be found among them; we give a permit to such an intruder only when two thirds of the landlords of the quarter consent to it. The rising piece of land may sometimes make it difficult for us to resist the temptation of admitting the big houses, but still we manage to put some order in the spontaneous growth of our city. The will of the majority of the interested parties decides also concerning the admission of workshops into the midst of the residential district.

"Had these general sanitary conditions of our city prevailed everywhere, as they should have done, there would have been no sufficient reason for Mr. Ebenezer Howard to start his 'Garden City' scheme. Look at these roads of reasonable width, on both sides of which are open spaces leading up to the dwelling-houses. These open spaces may be cultivated and arranged according to the taste of the owners. Proper sewers, supplies of water and electricity, as well as telephones, are to be found in every home. The satisfactory development of these remote parts of our city is due in some measure to a system of restrictions, final or temporary, adopted by the original land-owners and forced upon the new-comer. The measures may be more or less repealed when the suburbs of the garden city come into contact with the advancing town. Indeed, the rural illusion is complete, though, thanks to the means of rapid and cheap transit, the garden of the townsman is within a few minutes of the neighboring metropolis.



“Virgil and Horace would congratulate us on the successful interpretation of their verses:

O fortunatos nimium . . . agricolas!  
Pauca ruris jugera . . .  
In culpa est animus qui se non effugat unquam.

“Now every one of us may aspire to the pleasures of country life. Numerous building-societies, through their credit and agency, have helped those persons wishing to leave the town and settle in these rural districts.

“As you stroll out of them, you may have noticed many small inclosures on the roadside, where plants of different sorts, intended to please the eye or to serve in the kitchen, are grown. Here and there a green arbor or a little shed peeps out. These inclosures are small gardens let at a very low rent to those of our fellow townsmen who might fancy them. Philanthropic land-owners having large estates or vacant lots contribute their share for this needed work. These gardens are the resort of numerous citizens of small means. You may see them coming in the evenings or on Sundays; their rosy children and themselves enjoy there the country air and develop a love for nature. Such feasts are due to the commoner as well as to the nobleman, and we are very happy to see other people following our experiment on this point.

“Other special reforms have been accomplished. Thus, for instance, we have found out an excellent system for the removal of street-sweepings. We turn them into a fuel out of which we produce electricity, while the heat so obtained is used for preparing the water of our public baths. Further, we wage war against the street dust; for the present we sprinkle the road with tar or petroleum, but we hope to be able to improve upon this treatment. We wage war against town smoke; we have prevailed on those who burn coal to use smoke-consumers. In all things we consult the most experienced specialist, we invite competition, and we institute inquiries to be made where practical processes are fully tested.

“Lastly, we plant along our public highways, as well as along the roads radiating in the interior of the country districts, trees known for their hygienic properties, strictly avoiding those that spread unpleasant odor or irritating particles.

“(c) *Public Safety*. Beside our vigilance in behalf of sanitation, we had to insure public safety, especially as regards buildings.

“Limiting the height of buildings is, in an indirect way, a precaution against fires, for the deep air-shafts of enormous houses produce strong drafts, thus sending the flames rapidly through the numerous stories and the neighborhood. Skyscrapers, being very rare and at the same time absolutely fireproof, are no longer a danger. We insist on easy exits for all kinds of houses, and on abundant

water-supply with special fire apparatus kept in working order; our fire-brigade is not large, but always on the alert. We even insist on things which might surprise a new-comer; we should, for instance, feel very much ashamed if we heard that a child had fallen from a window because it was not provided with a sufficient railing.

"We condemn the cruel neglect with reference to the dangers of electricity. We have taken technical precautions, and explanatory warnings have been posted wherever needed. A century of electricity commands unceasing efforts to avoid accidents.

"Automobiles, bicycles, motor-cycles, and in fact all vehicles, are kept under severe control. Our ideal is not Shakespeare's school-boy, creeping like a snail, but we require that all means of rapid transportation be accompanied with automatic brakes, insuring a moderate speed.

"Everything which might lead to wanton misfortunes on land or water must be strictly forestalled. Unsafe river-boats must disappear from the public piers; bathers must be reminded by a special notice that bathing too soon after meals means risking one's life. Mountain-climbers must be made to beware of rashness, by placards or even fences indicating danger in particular places.

"If, according to Montesquieu virtue is indispensable to republics, we think that respect for human life is the first of republican virtues. The invitation to the public to attend shows reminding one of the old gladiatorial fights seems to us absolutely monstrous. We are not satisfied with the enforcement of laws made in the interest of the citizens; we are anxious to make citizens wise and prudent, even in spite of themselves. In circuses we would not allow professionals to expose their lives to amuse us. Bull-fighters and wild-beast tamers, who court death to satisfy the morbid brutality of some spectators, are, with us, things of the past. We should do our utmost to check those tempters of Providence who, packed up in a cask, would shoot the wild rapids of a river for the entertainment of thousands. Were not dueling and boxing out of fashion among our advanced people, we would certainly have stopped such practices. It is not in vain that philosophy and religion have taught us the love of our fellow creatures.

"(d) *Beauty*. Sanitation and public safety being provided for, we can turn our attention to the embellishment of our city.

"We have many charming points of view which show to advantage, our mountains, our pleasant river, our public buildings, and our historic spots. We are always anxious to prevent anything which might impair their beauty. Builders are not permitted to obstruct the view of any interesting scenery if it can be spared; special laws and regulations have been laid down for that purpose.

"Straight streets, more or less lined on both sides by gardens and shrubs, are restful to the eyes. The footpaths, being separated from

the carriage-road by a ribbon of grass where trees stand as sentinels, are protected against the dust. We have drawn up elaborate plans to secure rational and esthetic streets. Even the workman's dwelling may contribute to the charm of our familiar vistas. For beauty's sake we are ready to sacrifice a building-plot, to open up a new street plunging into old quarters, which will also become more healthy, to plant a tree or to relieve the monotony of a bleak spot with a fountain. Our parks, our bridges, our public edifices, are sober but elegant. At the street-crossings we substitute rounded, instead of sharp corners; this is more graceful, and wayfarers are protected against unforeseen jostling. We fight for beauty and against ugliness. Down with conspicuous party-walls; we cover and disguise them. We make our chimneys a pleasant accessory of the building. We will have nothing to do with gigantic signs on the stores, and are opposed to glaring advertisements on our street-cars, but we do not oppose placards posted on special stands, for they give some gayety to the street, while they render service to the public. We do not permit booths and repulsive erections to occupy privileged places and spoil the general impression.

"Our esthetic efforts have met with the sympathy of all, and any attempt to spoil the nice features of our city is sure to awake a prompt and unanimous resistance.

"(e) *Roads and Municipal Services.* Roads being of primary importance, we keep ours in good repair, after having constructed them with the necessary expense.

"On the inside of footpaths, a little tunnel easily opened at the surface contains, beside the sewers, pipes and wires necessary to the needs of each house and of the street. Thus no repairing causes any trouble.

"The clearing-away of the dust has been dealt with, and its removal causes no nuisance to the pedestrian. We use our sewerage for fertilizing gardens and meadows, and we thus turn it into a source of profit, making it at the same time inoffensive to the senses.

"Our city tramways, for a moderate fare, put the inhabitant in rapid contact with every quarter. Some of the tramways work on a short-time concession. If their profits exceed a certain sum, we provide that the surplus be divided between the corporation and the city, or partly spent in reducing the fares. Other lines are worked by the municipality. Time will show which of the two systems is the most advantageous to us.

"The ticklish railway question is now settled. Our central railway station will eventually be removed from its outlying position. The land reserved for other railways has been bought up by the city, which *pro tem* is letting it for different uses. The question of rapid transit has also been studied and solved.

"We are careful that municipal services, such as drinking-water, gas, electricity, and street-cars, be not injured by the mercantile spirit. We need moderate tariffs; we obtained them, and to the surprise of many we found them sometimes more remunerative than high ones, while they add to the comfort of the people by inducing them to make a liberal use of necessities.

"Domestic service in some parts of our agglomeration is offered by the community, as for instance the heating of houses by a central station. This interesting house service will probably be extended before a long time to the supply of hot water and even of meals. The advocates of coöperation, with their keen acumen, had long ago foreseen that what is now called municipal socialism would come to their help in the achievement of their programme.

"(f) *The General Headquarters of the City of the Future.* And now let me explain to you what I consider to be the mainspring of all our efforts," said Initiator. "The growth and development of our city are continually supervised by a parliament which is formed by engineers, electricians, architects, medical men, artists, competent administrators, and citizens distinguished for their ability and devotion to the public welfare. Come and see for yourself, since our Organum meets this very afternoon."

In this important body Initiator occupied the presidential chair. He had been appointed for four years Supreme Ædile, with extensive powers. In municipal matters, experts affirm, nothing is worse than irresponsible administration. Find a good man, pay him well, and give him a free hand. This is the principle upon which we work.

The Organum lays before the municipal authority the requirements and the necessary information to carry them out. Then the aldermen act according to their best judgment, but, as a matter of fact, they simply ratify the decisions of the Organum, thus giving them the force of law.

A Technical Committee presided over by the Supreme Ædile enforces the rules of the Building Code in letter and spirit. The library of this committee contains the Building Archives, wherein may be found the history of each house, and especially the sanitary repairs it may have undergone. These archives may be consulted by every one.

### *Practical Conclusions*

Having returned to my old-fashioned home in the city of my forefathers, I resolved to aid the advent of the city of the future in my own country.

But some one may ask, "Tell me where is the wonderful city which you visited and described to us!" Complete it is not to be



found anywhere at the present time. Old cities, however, such as Berlin, London, and Paris, are evolving toward it, and new localities, such as Washington, some model villages or towns in different countries, and ahead of all Garden City, near Hitchin, Hertfordshire, just now making its appearance, approach it still more closely. Moreover, the city of the future is an ideal which every one should try to achieve, since reflection and common sense command it. Let us then unite to bring about the noble and desirable city.

Here we have no time to spare, for it has become evident to all thinking men that our urban communities frequently present a regular state of anarchy, which makes one shudder with a feeling of awe when looking at them.

But some one objects: Why should not every landlord assert his right to make the most of the property he owns and erect upon it what he likes? If he dwarfs surrounding houses, deprives them of their part of light and air, and, in fact, depreciates considerably his neighbor's property, well, he is not to blame. It is the conflict of human interests, the struggle for life which is to be found everywhere. The weak shall certainly be defeated if they are too weak to protect themselves. Look at the business competition; the department stores crush the small shops, the trusts kill the small industries. Look at nations with their rivalries and their wars for supremacy.

This is, in some countries, a pretty general form of reasoning, but that does not make it any more conclusive. Indeed, anarchy is unorganized society, and if it appears that things have been allowed to go adrift, it becomes then the imperative duty of civilized men not to accept them, but to bring them under proper control. Moreover, we do not hesitate in affirming that if unlimited power should be given to private interests, such a state of affairs could not but end in great distress, nay, in bloody and disastrous convulsions. And, to confine ourselves to this point, let us proclaim again that cities must be made convenient for men to live in, and that if they were to become hells, this would be our fault and our punishment.

There are three periods in the onward march of human progress. First, the period of complaints, criticisms, and inaction. Secondly, the period of intermittent, tentative, half-hearted efforts. Thirdly, the period of thorough-going reforms, enthusiastically taken up by every citizen conscious of the duty of the hour.

The first period is absolutely fruitless. The second period presents an apparent effort on the part of administrative bodies to enroll themselves for the public good; but this interest is more apparent than real, and what they aim at is not so much to make effective work and go to the bottom of the evil as to avoid the reproach of being careless or inactive if some evil should happen which might have been prevented. It is then that conflagrations take place like those of the



Charity Bazaar at Paris, the Paris Opéra Comique, the Iroquois Theater at Chicago, and the *General Slocum* at New York, rousing the indignation of the world. It is then that the community is lulled by the setting of deceptive fire-escapes running along dizzy house façades. The same shuffling spirit is manifest in politics; what can we think, for instance, of the Berlin treaty meant to protect Armenians and then permitting their periodical extermination?

The thorough-going reform period carries everything before it, for the people and the government are one. The welfare of humanity now requires a concerted initiative from public-spirited men of all countries. An International League for the Rational City must be formed whose aim would be to prepare the best conditions to suit the special needs of urban communities. It ought to work through its congresses, by competitive prizes, petitions to the authorities, and by the agency of a widespread journal giving authoritative information.

Let us consider and not forget for a moment that our apathy toward this momentous object is responsible for the sufferings of millions affected in mind, soul, and body, so many of whom are doomed to become an early prey to disease and death. "O Varus, give us back our legions!"

## SECTION D--THE INDUSTRIAL GROUP



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(Hall 14, September 22, 3 p.m.)

SPEAKERS: PROFESSOR WERNER SOMBART, University of Breslau.  
PROFESSOR RICHARD T. ELY, University of Wisconsin.  
SECRETARY: PROFESSOR THOMAS S. ADAMS, Madison, Wisconsin.

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### THE INDUSTRIAL GROUP

BY WERNER SOMBART

(Translated from the German by W. H. Price, Harvard University)

[Werner Sombart, Special Professor of Political Economy, University of Breslau, since 1890. b. Ermslehen, Saxony, January 19, 1863. Ph.D.; Recorder of Chamber of Commerce of Bremen, 1888-90. *Author of Socialism and Social Movements of the Nineteenth Century; Modern Capital; and numerous other works of note on political and social economy.*]

My task is to sketch the historically peculiar circumstances of life amid which the industrial proletariat lives. By the industrial proletariat I mean the body of wage-earners in the service of modern industrial capitalism. And I intend to point out the relation of these conditions to modern progress in general. This problem might be attacked in either of two ways, — first by making prominent those phenomena, such for instance as state interference, which have a peculiar significance in the establishment of a definite social ideal and which furnish encouragement, as well, for undertaking definite reforms. This is the political point of view.

A second method would be to correlate such of these phenomena as we are able to recognize as the points of departure, the occasions, or the conditions from which arise the movements of the laboring class itself. This is the evolutionary point of view, from which can be answered the question, What makes the social movement possible? In the language of Hegel and Marx this sort of inquiry would be called the dialectic method. And this is the method of inquiry which will be adopted here.

In order rightly to judge the conditions of existence of the modern proletariat we must first of all understand what it has lost as compared with other groups of people, what it no longer possesses of the conditions of living of its own former generations. Hence I must pay special attention to European conditions, which indeed are necessary to an understanding of all social phenomena. My discourse cannot be more than an introduction to a big subject.

Estrangement from nature is the most important feature of the proletarian existence. The contact of the country lad with nature

ceases, — the friendly relation with the animal world, the growing up with the elements, rain, storm, and inclement weather, the dependence upon the events of nature, the rotation of summer and winter, of day and night. The modern industrial wage-earner becomes a characteristic representative of that artificial race of men now growing up in cities. Away from his natural environment, that is, away from home, the thousandfold spiritual ties and tender sentiments are lost. His home is the world, he is a child of the world.

Another feature of the laborer's existence is his liberation from old institutions which confined him but restrained him as well. Among these was the village community with its customs and its usages, its festivals and fashions, which in part survive in the smaller towns. *Propinquitas!* But the proletariat has cosmopolitan customs and usages. Thanks to the development of commerce, provincial manners are abandoned.

There was also the family group. Not only is the old family connection, with its far-reaching interdependence, giving way, but the immediate family is also losing its binding power because the economic basis upon which it rests is disappearing owing to labor away from home, night work, and the labor of children and women who no longer find satisfactory employment at home. The early employment of children and youth makes them independent at an early age, and thus is weakened the discipline over children by parents. To this must be added the sordidness of the dwelling-houses in cities, for this narrows even more the basis of family life.

We must note, also, the decay of trade-associations built up by the medieval handicrafts, by which membership in a definite craft provided the individual ample internal and external status. Membership in a trade, however, is losing its hold as a result of the frequent change of occupation. For an individual passes with greater ease than formerly from one occupation to another, while the array of labor arrangements mobilized for a united productive activity has to be constantly remmarshaled owing to the influence of the modern revolutionizing technique. The mechanical arrangement of individual operations which constitute an industry leads to a constant change, just as surely as a personal classification leads to the stereotyping of the industry.

Another cause of the decay of the trade fellowship is the dissolution of the intimate relation of the worker and his work. Activity is no longer the expression of a lively human interest, it is only the mechanical turning-off of some one simple process. The empirical technique of the olden time rested upon personal skill; the modern technique rests upon objective science. The organization of industry upon the principle of the division of labor separates the laborer from his work and makes him a mere soulless piece-worker



in the social process of production. The capitalistic organization also separates the worker economically from his work. He is no longer economically interested in the results of his work.

The old servile rights and obligations have been destroyed. Every earlier time has recognized mutual responsibilities with respect to the dependent man, which indeed bound him, made him unfree, but gave him physical and moral support, protected him from hunger, and helped him over crises in his life, such as sickness. Even the slave or serf had this claim upon his lord. The journeyman of the Middle Ages was united to his master by a close fellowship supported by the feeling of moral obligation. This relation is disappearing. The modern workman is a "free" laborer, legally free, who now stands only in a business relation with his employer; services are rated on both sides at a money value. Therewith he is free to go hungry because without protection from commercial crises. He must win his bread from day to day and be prepared at any time to lose his position. In other respects his freedom is a mere formality; he cannot exercise it by not working; he can at best change masters. But this is becoming closed to him because capital is being monopolized in trusts. As soon as he succeeds in finding work, he is for the greater part of his life driven to the hardest drudgery in the service of the capitalistic undertaker. He is then less free than any Turkish peasant who plows with his oxen in a free field.

How will, how can this "free," that is to say, uprooted cosmopolitan live? This is the question which presents itself for him as well as for all who have experienced the same process of emancipation. This is the question of the time, which receives only one definite response from the proletariat. The recovery of the content of life is to be sought in two ways, — by means of pleasure and by means of labor. Pleasure as one of the features of life is necessarily denied to the great mass, clearly from external causes, perhaps also from internal causes, because people are still too "sensible" to find a motive of life in pure pleasure, material or spiritual, *i. e.*, in estheticism! They still require self-sacrifice, an object, morals. There remains clearly open only the second way, — labor. "To labor and not to despair," has been proclaimed as the watchword for our hollow age. And the poet sings so sweetly

" 'Tis labor alone that helps us along  
Over this wilderness of gloomy doubt;  
It gives to each passing moment a goal  
Which our life itself is without."

But how is it with the labor of the wage-earner? Often enough he has no work at all. The condition known as "being out of work" has established itself as a matter-of-course accompaniment of capital-

ism,—another novelty of our age. But also, by the time he finds work its power of yielding satisfaction has for the most part been lost. This is, perhaps, the most significant consequence of modern civilization. Labor as the sanction of life, as the director of energy, has ceased to round out the worker into the complete man and hence to make him peaceful and contented. The reason for this lies in the peculiarity of modern technique as well as the organization of modern business, for the modern factory labor is in large measure destructive of health, above all because it calls for too intense an exertion, and because of that disregard for the limits of human endurance which characterizes the modern technical development.

Moreover, labor has frequently become a disagreeable, repulsive act, in the depths of the earth and amid the noise, dust, and heat of many modern factories. Labor has become more and more monotonous and unrhythmical, mere piece-work of unvarying nature in the modern great industries built up by division of labor and consolidation. The laborer is now separated from his work, he creates no longer, he fashions no longer, he brings nothing to completion, nothing appears as his work, nothing in which his labor is embodied. He is no more than a secondary wheel in a gigantic mechanism.

The labor of the modern industrial wage-worker has thus lost all concreteness, all qualitative significance, and so has for him only an abstract and hence purely quantitative significance. And so it becomes a burden of which he seeks to be relieved as much as possible. (If we realize this we come to comprehend the endeavors for shortening the hours of labor, which give the characteristic impress to the modern labor movement.) And so also it comes to be measured in the terms of the money for which it is exchanged. Thus it was that the wage-earner was involved in the circle of ideas of the capitalistic world. The mechanism which accomplished his inclusion was the piece-wage system, after the pure money-wage had already accustomed him to value all labor power in terms of money. This valuation in money is imbued in him from early youth, for he enters "service" early, at a period of life when hitherto a youth lived without responsibility as a dependent member of a family.

Here lie the roots of all class strife between proletariat and entrepreneurs, who are now at odds regarding their respective shares in the joint product. "The right to the whole produce of labor!" The foregoing sketch of the peculiarities of proletarian life explains what we mean by the modern "social movement," wherein the proletariat struggles against the position into which capitalism has brought it.

When we observe the proletariat setting forth to emancipate itself from its position, and see how the movement is carried on with the passions of hatred and envy, the conviction forces itself upon us that

the origin of the movement is not hopeless misery, for this is no characteristic of the proletariat. The cause is rather the contrast which the laborer observes between his own frequently pinched position and that superabundance of wealth in which many of the employing class live, wealth which the laborer has, in his own opinion, produced. For in their service he wears himself out. And this contrast is constantly brought to his attention, not so much because he sees that insolent wealth used in display, oftentimes vain enough, — the poor serfs of the Middle Ages endured that sight, — but rather because he daily witnesses the accumulation of new fortunes, whose possessors grow rich before his very eyes. Frederick Albert Lange accurately and forcibly expressed this attitude when he once said, "The spirit of jealousy never completely disappears while a poor man lives in the neighborhood of a rich man; it may, however, be rendered very dull by constant relative wealth." But by fluctuating relations and by every occasion which makes the present contrasts more striking, the feeling of envy is quickened. To this, what we might call objective insecurity of wealth relations, which is characteristic of our times, and which the proletariat observes, is added another insecurity which for the laborer is a subjective one. This is the uncertainty as to the means of his livelihood, the fact that he does not know from day to day whether he is going to earn his bread. For an industrial depression may result in the wholesale discharge of laborers, and thus in widespread famine.

It is this continual change which brings to a member of the proletariat a consciousness of his position. The increasing intellectual training, to which his life in great cities powerfully contributes, enables and inspires him to reflect upon the causes of this insecurity and upon the contrast between his own position and that of the rich. And then a secret is revealed to him, the discovery of which becomes the ground of justification for the modern agitations of the laboring class, the secret, namely, that all the circumstances of his existence are not founded in unchangeable, natural relationships. On the contrary, they are based upon the peculiarities of the prevailing social and economic organization. "No man can assert any right against nature, but in society distress at once assumes the form of an injustice inflicted upon this or that class." (Hegel.) Thus the ground is prepared upon which a social movement may be developed, for now a point of attack is found, — the existing social order.

And to the extent that social criticism of this sort becomes refined and sharpened, as discontent and the desire for improvement become intensified, another circumstance which defines the position of the wage-earner becomes more and more intolerable. This is his dependence upon his employer. This dependence is no longer a legal one, as in the time of slavery, but is no less complete on that account.

It appears in the fact that the laborer is assigned to his position by the entrepreneur through stress of hunger; it appears in the humiliating subordination under the command of an entrepreneur. It often assumes a medieval form when the factory-owner regards himself as the "patriarch" of his people and seeks to guide and determine their lives. It reaches out into the sphere of political right when the capitalist classes use their power in order to limit the participation of the wage-earners in the activity of the state.

Apparently these are the causes of the proletarian criticism of the existing organization of society, yet we must attend to some other special conditions of life among the modern laboring classes in order to understand the peculiar current of ideas which we continually meet with in all clamors for the "emancipation" of the proletariat. These might be distinguished on the one hand as a tendency toward communistic dreams, and on the other as a love for the masses.

The love of the masses and regard for the masses follows immediately from the association of each individual wage-earner with his thousands of fellow workers, all of whom are united by no other tie than their common labor in the service of the entrepreneur. They are grouped together without distinction, like grains in a heap of sand, and outside the factory undertake no higher social activity than some sort of union. What capitalism has tossed together, in crowds, in great cities and centres of industry, is, as we say, an inarticulate mass of individuals who have completely broken with the past, who have cut themselves loose from all communal ties, from home, village, and kindred, beginning life anew with a complete destruction of their old ideals. The laborer's only support is the comrade of his fate, who signifies as little as he, and who like himself does not belong to any historic community. With this individual he allies himself, and becomes his confederate. Hence arises a host of confederates who are distinguished by one thing above all others, not by individuality, not by common tradition, but by their mass, their massiveness. Never in the history of the world have so many individuals stood together for united action. Never in history has the impetus of mass-action so characterized any movement as has this of the proletariat. Everywhere we hear "the heavy tramp of the labor battalion" with which Lassalle sought to frighten his opponents. And if we would picture to ourselves the social movement of our day, it invariably appears to us as an inexhaustible stream of men hardly one of whom stands out clearly, flowing over the whole land as far as the eye can see, to the farthest horizon where the last of them roll away into the darkness. Translated into psychological terms, it signifies that there has grown up in the individual a tremendous strengthening of the consciousness of combined power, and a strong mass-ethical feeling to conflict with class-ethical



doctrine. Membership in his class, therefore, signifies for the wage-earner exactly what for others membership in a noble rank, in a community, a city, or a state has implied. With pride, he proclaims, *Proletarius sum*.

This dissolution of all quantitative or individual distinction in the mass, now viewed and, therefore, now valued only qualitatively, is parallel with and affects in the same manner the development of modern technique in other directions. Only he who has familiarized himself with their peculiarities will be in a position to understand the important features of the proletarian movement, and above all to comprehend the above-mentioned communistic tendency.

The increasing differentiation and integration of separate economies, their absorption into an indissoluble whole, on the one hand, and on the other, the progressive specialization and organization of labor in the modern "great industries" constitute what has been called the socialization of the process of production. This socialization has brought it about that a particular commodity appears no longer as the product of individual labor but as the joint product of common labor. Formerly the cobbler who made a pair of boots regarded himself as the fashioner of this particular article. The laborer in a modern shoe factory, who pursues only a single task in the general process, has lost this personal relation to the particular product. To-day the actual process is collective for individual articles, and, therefore, to the task laborer engaged in it, the conception of a collective organization of general production is no more strange. In the same way, however, and at the same time, the idea occurs to the laborer in the great city, of a common, of a communistic consumption. This idea is made more and more familiar to him by the character of his own home surroundings.

The separate dwelling, which satisfies man's original instinct for privacy, loses for the poor man in his congested tenement more and more of its charm. Instead, he feels a growing liking for public places where he can satisfy more completely his material and immaterial needs. Workingmen's clubs, public reading-rooms, concert-halls, and beer-gardens become a new home for the masses in great cities. The aggregated advantages of the public institutions, the public gardens and parks and museums, with their uninterrupted series of pleasures and delights, rise in the estimation of the laborers as the charm of their private or family life diminishes. The family itself dissolves under the influence of the excessively long day or night work away from home, through woman's labor, and the early employment of children. The result is that the proletariat is involuntarily led to transfer the weight of its interest from the individual to the social life.

Now, however, to gain a full understanding of the modern social



movements, we must become acquainted with the general conditions of the time under which they operate. Here also a few remarks are necessary. That which distinguishes the modern time is, above all, an alertness such as I can think of in no other time. A current of life flows through present-day society, of which no other time has known, and thus is made possible a stimulus between individual members of society, which was before inconceivable. This has been brought about by the machinery of commerce which capitalism has provided. The possibility of communicating across a great country within a few hours by means of the telegraph, the telephone, and the newspaper; the possibility of transferring from one place to another great masses of people by the modern facilities of transportation, has brought about an appreciation of the solidarity of the great masses, and a sense of omnipresence that to earlier times was unknown. This is especially true of the great towns of the present. The possibility of great mass-movements is thus extraordinarily increased. And in like manner is attained that development within the mass which we are accustomed to call education. Knowledge, and with knowledge pretensions.

Closely connected with this activity, however, is that phenomenon which we call the nervousness of our time, the lack of composure, the hurrying, the restlessness pervading all the walks of life. Through the peculiarity of business relations in all branches not only of economic, but also of social life, this restless spirit prevails. The era of free competition is manifest in all fields. Every one vies with his neighbor. No one longer finds joy in life. Beautiful contemplative peace is gone.

And finally, one more suggestion. This might be called revolutionism. For there never has been a time which has experienced such a complete subversion of every form of existence. Everything is in a fluid state, business, science, art, morals, religion. All ideas are in such a ferment that we are finally driven to the conclusion that there is nothing certain left. And this is one of the most important criteria for the interpretation of the modern social upheaval. For it explains two different things. In the first place it accounts for that destructive criticism of existing conditions which seeks to throw a bad light upon everything; which casts to the scrap-heap all former ideas in order to bring new ones to market. This critical spirit first took its rise among the *bourgeoisie*, who applied it to political, moral, religious, and esthetic relations. The proletariat is now adopting the same critical spirit, and applying it to the whole intricate field of economic and social institutions.

That revolutionary spirit produces, furthermore, fanatical ideas concerning the possibility of a blissful future state. Since miracles have been realized before our own eyes, such as none could have hoped

for; why not still more? Why not anything we wish? Thus the revolutionary present becomes the breeding-ground for the social Utopias of the future. Edison and Siemens are the spiritual fathers of Bellamy and Bebel. Here we have at hand the elements of which are constructed the "Socialism and Social Movements" of our time.

## CERTAIN PSYCHOLOGICAL PHASES OF INDUSTRIAL EVOLUTION

BY RICHARD T. ELY

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A FEW years ago we heard a great deal about a new forward movement in economic theory that was attributed to a profounder study of the psychological forces at work in man's socio-economic activities than had previously been made. Professors Menger, Böhm-Bawerk, and Wieser, leaders in the so-called Austrian school of economists, were most prominent in this renaissance, and their chief service was a new elaboration of the theory of value based upon a more careful analysis of man's mental processes. But the distinguished German economist, Adolph Wagner, of the University of Berlin, who long before the Austrians were widely known, achieved fame, has frequently insisted upon a deeper study of psychological forces in our industrial life as a condition of an improvement in economic science. Wagner's treatment of capital affords illustration. An examination of psychical considerations disclosed by the study of economic society, he tells us, gives reason to believe that only under private ownership will there be a sufficient accumulation of capital.

Strangely enough, with all this emphasis upon the psychology of economic life, the peculiarly psychical elements at work in industrial evolution have received little distinctive attention even at the hands of scientists, while their existence appears to be almost unknown to those whom we ordinarily call the educated public. Nevertheless, it is precisely the so-called psychological considerations which are decisive in the elaboration of a wise policy as well as in the correct scientific treatment of industrial problems. In other words, in my opinion we have had the smallest attention given to the psychological considerations precisely in that field of economics where the

psychological method is likely to yield the richest returns. It is my purpose now and here simply to throw out a few suggestions which go to prove that we cannot understand industrial evolution unless we give careful consideration to psychical forces at the same time. These considerations, it is hoped, will throw some light upon a correct solution of important industrial problems.

The fact of the evolution of industrial society is generally recognized, although its implications are not a part of our familiar knowledge. A study of the history of industrial society reveals clearly that we have passed through various stages. It is not necessary when we say this that we commit ourselves to any particular theory of stages. According to the old and well-known classification mankind has gradually progressed from the hunting and fishing stage to the pastoral stage, from the pastoral stage to the agricultural stage, and then has passed through the agricultural stage to the handicraft stage, and finally to the machine stage of production. Each one of these economic stages has, of course, a subclassification into phases. This gives us simply a general line of industrial evolution and does not imply that every portion of the human race must pass through the same stages and the same phases of evolution within the stage. It would take an undue amount of space to enter into a discussion of the scientific arguments and reasons for the position that this classification is sound. It seems necessary, however, on account of the limitations of the human mind, to divide our industrial evolution, which has a history of thousands of years, into periods in order to help us arrange our facts systematically and accumulate knowledge. We find men in historical periods living in each one of these stages. Each stage has in its full development characteristics of its own distinguishing it from the preceding and likewise from the following stage, when we consider these also in their full development. Between the stages at their culmination we have the transitional periods where one gradually changes into the other. No one will deny that the handicraft stage of the Middle Ages is radically different from the industrial life that we live now. Now, it is precisely when we consider our industrial evolution psychologically that we find the most meaning in the division of our economic or industrial life — for the two terms here are used interchangeably — into stages and sub-stages, designated as phases. As we pass from stage to stage and from phase to phase in the stages we notice certain changes in those habits, mental traits, and characteristics which lead to success. We have a certain psychical type of man corresponding to every phase in our industrial evolution. Where an individual has this psychical nature he is in harmony with his environment. The absence of this psychical nature results in disharmony and lack of adjustment. This is our first main position.

Our second main position is that as we advance from lower to higher stages a better man is required. What is essential in a higher stage is not a later period of time but a greater control gained over nature by man. The purpose of our economic activity is to gain subsistence through control over nature, and just in proportion as we gain more abundant subsistence through increased control over nature we may be said to advance to higher stages and phases in our economic life.

Our third position is that there are those who in their life do not keep pace with the general industrial movement. They are left behind and, unless special measures are taken to prevent it, a period of rapid movement means a relatively large number who are unable to adjust themselves to conditions.

Our fourth main position is that the movement in our economic life has continued for thousands of years and that those who are most advanced economically are separated psychologically by thousands of years from those living in the earliest conditions. They are the descendants of generations of men who have had all this time for adjustment, an adjustment secured very largely by natural selection.

If we reflect upon the change from the agricultural stage to the handicraft stage it will help us to understand these psychological features in industrial evolution. The handicraft stage is one in which man gained a greater control over nature, first, through the larger use of tools of a higher kind; second, through greater wealth accumulation with a devotion of a larger part of this wealth, particularly in the form of capital, to the preparation for future needs; third, through closer association with his fellows. Let us examine in its implications each one of these three methods by means of which nature has, to an increasing extent, been subjugated. The use of more tools of a higher kind means more complex brain operations. As we go forward in our industrial life an examination of the features of this life shows clearly that the man who is fully equal to it has to meet increasingly severe mental tests. Next we observe that a greater degree of self-control is required as a condition of success in a higher stage of economic life. Wealth must be accumulated not for immediate consumption but for future consumption. This means abstinence and self-control. It has been found necessary to pay some men of a low type twice a day in order to induce them to continue their work. A man of an advanced economic type will make an effort now without the slightest thought of reaping the fruit of the effort inside of ten years. The closer association of man with his fellows is one of the means whereby we gain increased power over nature; and as our efforts in production advance associations of an economic character continually become larger and closer. This means the ability to work for others steadily and persistently in



organic relations. If large success is to be achieved there must be power to command and a readiness to obey while a state of liberty is at the same time maintained.

What has been said finds an increased emphasis when we compare the present machine stage of production, characterized by a high degree of competition, with the earlier handicraft stage. Especially are alertness, adaptability, and quickness of adjustment conditions of large success at the present time. The ties of an economic character binding us to our fellows have increased extensively and intensively with unprecedented rapidity. The term "industrial society" has only recently become familiar, and this is a result of these ties. As a further result we have a growing social self-consciousness which imposes its own problems upon members of an economic society, but which at the same time is one of the essential conditions of our advanced life.

It follows naturally enough that those who succeed in a lower stage are crowded down and out in a higher stage. It is proved conclusively by history and by present observation of easily accessible facts. The piratical merchant who is a hero in an earlier stage hangs from the yardarm in our stage. The ancient Germans, Tacitus tells us, thought it a disgrace to gain by the sweat of the brow what could be secured by the sword. There is no room for doubt that many a modern bandit would, in an earlier and cruder stage of society, have been a hero. This is, perhaps, a sufficiently familiar observation, but the implications of it are often overlooked even by scholars when they come to treat present economic problems. Men are in varying degrees mentally prepared for the present economic conditions which have been gradually reached during thousands of years. Within the nation there are those who, in mental traits and characteristics, are only imperfectly prepared for modern economic life and must be treated correspondingly. Man's mental and moral makeup is capable only of a limited modification after the period of maturity, and even in the case of children heredity sets a limit to the possibilities of modification, although this limit is a far more flexible one. To take a very marked illustration, we have, in the United States, on the one hand, the Negroes, and on the other hand, the Redmen, who, themselves or their near ancestors, were brought up in a stage of industrial society separated from ours by a period of hundreds if not thousands of years. Is it conceivable that in a short period they can acquire those characteristics, such as forethought, careful planning, and awaiting results, which lead to success in the most advanced economic society? What is true of these races is true only in a less marked manner of other classes of society. We may lay it down as a general proposition that during the past century the generalization of economic progress has been more rapid than the generalization of

psychical traits corresponding to the phases of industrial evolution through which we have been passing. We have a society which, broadly speaking, has become coöperative under competition, but many men have not acquired those psychical characteristics which adapt them to a society at the same time coöperative and competitive.

This point, that there is a lack of correspondence between many men and classes of men and the particular phase of industrial evolution reached at a given moment is one to which in my opinion great importance should be attached; and I beg, therefore, to offer an illustration taken from the changed and changing conditions of American agriculture. Not that I mean thereby to imply the absence of similar changes elsewhere. Quite the contrary. I take this illustration because it is familiar to me from observation and because it is especially striking.

Successful agriculture is becoming daily a more complicated occupation, requiring a larger and higher type of man as time goes on. We have more and better machinery and less and less merely manual toil. We plant, cultivate, dig, and harvest by machinery. This means the accumulation of an increasing amount of capital, an awaiting results or a lengthening-out of the period between effort and the fruition of effort; also it means the capacity to handle the machinery effectively.

We have a continuous evolution from simplicity to complexity. As Professor Elwood Mead has well said in one of his *Irrigation Reports*: "The traction engine and the automobile have both an assured place in the economic operations of farms. Improvements in electrical transmission render it certain that water power is to be used more largely than in the past. Farm buildings, instead of being simply storage places for grain or shelters for live-stock, are becoming as complex in their designs and uses as factories."<sup>1</sup>

Irrigation also shows the need of a new type of man in agriculture. The old-type farmer was by training an individualist. He looked to himself for success, and his isolation in his activities so influenced his character that his individualism seemed to become a part of his nature. But when the farmer from Old England or New England goes to the "Far West," where the only agriculture is irrigated agriculture, he must unlearn his individualism and become a co-operative man as a condition of success. The first farmers in a state like Colorado cultivate the bottom lands by means of simple, inexpensive ditches. Even this implies the use of more brain power, as a knowledge of the proper ways to apply water to secure the best result

<sup>1</sup> Review of *Irrigation Investigation for 1902*, Washington, D. C., in the *Annual Report of the Office of Experiment Stations*, p. 368, United States Department of Agriculture.

is required. But as time goes on the ditches must be made increasingly large and expensive in order to cultivate the higher, so-called bench lands, which it is discovered are the more fertile. A single ditch means the investment of hundreds of thousands of dollars. Reservoirs are next constructed so as to save the flood-waters and to equalize the supply of water, bringing water to crops late in the season when natural streams run dry. The relations of farmer to farmer and of farmers to others who need water for manufacturing purposes or for urban purposes become daily more complicated, until the solution of the problem thus presented becomes a task worthy of the best intellects of our time. Now it is said that it requires a high type of man to succeed in agriculture in a state like Colorado, and I must say that I have never elsewhere seen farmers who, as a whole, impressed me as so active and alert, so much like capitalistic manufacturers. Those equal to the task set by irrigated agriculture seem to make large gains, and the others to be crowded down and out. At the same time the proper regulation of the economic relations involved in irrigated agriculture is a condition of the utilization of natural resources and also a condition of liberty, for without regulation we have the oppression of the weak and the tyranny of the strong.

The American Economic Association has recently published a monograph by Dr. H. W. Quaintance, instructor in economics in the University of Missouri, that throws a good deal of light on the nature of agricultural development. It is entitled *The Influence of Farm Machinery on Production and Labor*. One fact brought out clearly is the newness of our present farm implements and agricultural methods. It is stated that agriculture in our colonial period was not markedly different from that of Egypt two thousand years ago. On the other hand it is shown that on an average for our nine principal crops, namely, barley, corn, cotton, hay, oats, rice, wheat, potatoes, and rye, nearly four fifths of the present yield is due to the use of farm machinery. That is to say, farm labor is estimated to be nearly five times as effective in the production of these crops as it was as recently as 1850. With the exception of one of the nine crops, namely, cotton, a decrease of labor is absolute as well as relative. But this means difficulty of adjustment along several lines and also increased demands upon brain power and moral force. It requires a far larger amount of capital than formerly to carry on agriculture with success and consequently hired laborers have been increasing rapidly in states like Illinois. It requires a better man to use machinery than to carry on agriculture by the old methods. Consequently we find a large increase in the daily wages of workmen employed in the production of crops which require a use of machinery and a knowledge of machinery on the part of the hired laborers. On

the other hand it is stated that the average daily wages of agricultural laborers who are engaged in those branches of agriculture which require little machinery have actually decreased.

Even more striking are recent methods in corn culture which are being introduced in the Central West. We have long heard about pedigreed stock and now we are becoming familiar with pedigreed corn (maize). A bulletin published by the University of Illinois in August, 1903, gives an analysis of corn taken from forty ears, each of which represents seven generations of pedigreed corn and each bred with reference to some particular quality. It is not enough to raise corn, but corn must be raised for special purposes in order to achieve the largest success. Stock-feeders want protein in corn, and by breeding it is easy to make a variation of 100 per cent in protein. Manufacturers of starch and of glucose sugar want more starch in the corn. They, however, want less protein. It is stated in an earlier bulletin, likewise of the University of Illinois, that "the yield of corn can be increased and the chemical composition of the kernel can be changed as may be desired either to increase or decrease the protein, the oil, or the starch." The purpose of this reference to pedigreed corn is to bring out clearly the significance of economic evolution with respect to the kind of man who is going to achieve the greatest success in agriculture.

The use of automobiles elsewhere than in agriculture affords further illustration of the thesis under consideration. Automobiles are not used so much as they would be in retail trade because the employees are so frequently not equal to the higher requirements thereby set. A grocer's boy who can drive a horse may not always be trusted with the automobile. But progress is simply delayed. In the end those not equal to the higher requirements will be pressed down and out and will render existence more difficult in the overcrowded ranks of those with the minimum skill and capacity.

Let us now seek illustration in certain phases of the labor problem. A good illustration is afforded by a comparison between transportation by the steam railway and transportation by a wagon drawn by oxen or horses. The more advanced kind of transportation carries with it higher physical and moral requirements for those engaged in it. Not only are temperance and sobriety requisites, but eyesight must be tested as a condition of employment for the locomotive-driver, whereas an inferior man may drive a team of horses.

The minimum wage established so generally by trades-unions has a similar consequence. Those who are not equal to that degree of efficiency warranting this minimum wage are crowded out of their trade. This is a condition for which, in some cases at least, provision has been made by labor organizations, so clearly has it been recognized.



On the other hand we have an antinomy, as we may call it, in the fact that this same industrial evolution has in consequence of the division of labor given us some employments of a routine character exceedingly simple, apparently soul-deadening, and very poorly paid. These occupations fall to the most helpless classes in the community, recruited by those crowded down and out of those kinds of labor requiring growing efficiency.

All this we may bring into direct connection with the struggle for equality of opportunity. The progressive evolutionary stages of industrial society set increasingly difficult tasks, and as a result of the unequal development of men we have capacities almost infinitely varied when they are applied to these tasks.

The subject of contract brings before us in a new way the increasingly complicated nature of modern industrial society and enables us to see it from a new viewpoint. This is of particular importance in the consideration of the labor problem. Labor remuneration is governed by contract and contract determines the other conditions of employment. Now modern contract becomes daily a more intricate affair, which, for its interpretation, taxes the ingenuity of our ablest legal minds. On the other hand it requires a rather developed mind to grasp even the essential elements of contract. One of the obstacles to reform in Turkey is said to be the difficulty the ordinary Turk has in understanding the significance of time.<sup>1</sup> Yet the concept time is one of the first elements in the labor contract. Let us pause for a moment to consider the difficulties with which we are confronted when we consider contract. Contract must be viewed as sacred. It is a necessary foundation of our socio-economic order. We admire the man "that sweareth to his own hurt and changeth not." Thomas Jefferson wrote in his Bible opposite that verse and the verses accompanying it in the Psalms, "the description of a perfect gentleman." And we feel that he was right. Yet in contract we have all the hardnesses, injustices, and cruelties of nature. It is simply a medium through which existing forces find expression. The individual must obey his individual contract; but it is apparent that there must be a higher power, a public power, controlling, regulating contract, forbidding some contracts, determining the conditions of others, and in extreme cases dispensing from the obligation of contract, as the courts in Germany may do in the case of usury. Public authority must be the binding and loosing power. Let us again seek an illustration in irrigation. From the Platte River system in Colorado, Wyoming, and Nebraska more than two thousand ditches take water. The absurdity of the idea that voluntary agreement expressed in unregulated private contract can divide

<sup>1</sup> *North American Review*, August, 1904, "Obstacles to Reform in Turkey," by Charles Morawitz.



up this water satisfactorily becomes apparent on a few moments' reflection to one who knows even the primary elements of the problem involved.<sup>1</sup>

If space were sufficient it would be interesting to consider at some length those who are left behind by industrial evolution and the problem that they present. We have those who make up the element in our population that has been called the submerged tenth. These must be carried as painlessly as possible for themselves but without injury to society. Criminals are included in this submerged tenth. It is now generally conceded by criminologists that they should be shut up during criminality and that the aim in their incarceration should be reformation. It is also clearly perceived that we must define our terms and not place among the criminal class those who by nature do not belong to it. No one can say how large the class of natural criminals is, but it is much smaller than has been frequently supposed. When we look at the facts of the case we discover that in our bungling we have been making criminals of men. It is as true as it is trite to say that the ordinary county jail is a school of crime. Through juvenile courts and modern methods we know how to reduce the number of criminals.

We may consider also the feeble-minded who require custodial care and those educational methods that will give them the highest development possible. At the same time they must be confined to prevent reproduction.

We have the insane who are not equal to the strain of modern life. Thus we could continue. We have a permanent condition in those left behind in the transition from stage to stage and from phase to phase. The only way that this can be prevented is through the control of reproduction of human species. Something can be done in this direction and is being done, as for example, in Wisconsin, where the feeble-minded are confined, and as in Connecticut, which has the most advanced legislation in this country on the subject of marriage.

The main industrial problem is found in the conditions of the great mass of men who are capable of development, but require help to help themselves in order that they may become equal to modern industrial conditions.

We have, as we advance, and with every stage in our advancement, an increased expensiveness of adjustment on account of the greater demands on the individual in the more complex society. This is part of the price of industrial progress, and the wealth to pay this price is furnished in the very increased productivity which causes the higher price.

<sup>1</sup> Elwood Mead's "Review of Irrigation Investigation," in the *Annual Report of Experiment Stations for 1902*, pp. 374, 375, United States Department of Agriculture.

The great problem then is the creation of institutions in accordance with the needs of the different elements in the community, if we arrange these into classes to correspond to their mental and moral characteristics. We have as a matter of fact been creating such institutions during the past one hundred years. All civilized lands have been engaged in this activity and they have created institutions to serve the purposes of classes of men with widely varied needs and capacities even in opposition to preconceived and generally accepted theories. This has been particularly the case in the United States. I believe that this is an explanation which throws new light on social progress. The movement is destined to continue as it is an inevitable outcome of that mighty struggle for equality of opportunity which is shaping human history.

We also have this economic problem when we come to deal with those of other nations as we do in this era of expansion. It is a problem, for example, to what extent landed property in severalty, with its free sale and purchase, is adapted to those tribes of people who have not acquired the type of mind which has been gradually evolved by the most civilized nations during the course of their history. Let us once more take the case of the North American Indian. If this line of argument is valid, is it possible that in a few short years he should become adapted to that form of property which the most highly developed people in the world have reached as a result of an evolution of hundreds and thousands of years? If the problem is to change the nature of the Indian, must we not shape our institutions to his conditions and allow him generations to adapt himself to the most modern institutions? If this line of argument is true, we must expect that the results of property in land in severalty among the Indians will be that they will lose their land. To prevent alienation of the land allotted to the Indians for the period of twenty years seems absurd, as the real problem is a change of Indian nature.

Continuing this line of thought, that we must provide institutions adapted to the needs of the various classes in the community, we come to the problem of insurance. The gifted and capable can make their way and do make their way in competitive society based upon private property if they do not meet with accidents. It is absolutely impossible that the ordinary man should prepare for all the contingencies of modern industry. Accidents may befall the worker just at the initial period of activity, and they may come in middle life. It is beyond possibility for the ordinary man with ordinary wages to make adequate provision therefor through his own unaided efforts. The solution of the problem of contingencies is found in insurance, which is making such rapid headway throughout the world and in which Germany has left all the rest of the world so far behind. There is no greater labor problem than that of insur-

ance. This can be provided by government or by private individuals. In the United States great private corporations are doing something in this direction. There are obvious limitations to what can be accomplished by private effort. A great proportion of the wage-earners must always be employed by private individuals or by firms and corporations not sufficiently powerful and stable to furnish satisfactory insurance. Apart from this, there arises the question, To what extent may a really desirable freedom of movement be impeded if employment and insurance are furnished by the same persons?

I think it is now generally conceded that the risks of industry should be borne as a part of the cost of production, and this must be secured by general measures. England has, perhaps, gone as far as possible through employers' liability. The investigations of the Industrial Commission of the United States show that, to a very great extent, the blame for accidents cannot be laid either on the employer or on the employee, as accidents are a natural outcome of production. In many cases there is blame, especially when the best safety appliances are not provided, but the establishment of blame does not bring with it a remedy for the economic incapacity of the individual wage-earner. Much governmental activity in the way of supervision is required to make the industry bear the burden of the accidents and contingencies which befall the workers and to make indemnity certain.

The question of pensions is closely connected with that of insurance. When old age is reached we have also reached an appropriate period of rest. Competition has done its work and society has no further economic services to expect from the individual. The problem is to provide for those who have reached old age without weakening the springs of right economic activity in others.

Returning once more to competition, the trite phrase, a high ethical level of competition, suggests a large number of problems and appropriate methods for their solution. Society determines what we may call the rules of the game and does so in accordance with its ideals, which gradually become clearer as social self-consciousness becomes more pronounced. When we determine that no child under fourteen shall be employed in a manufacturing establishment we do not lessen competition, but we simply determine one of its conditions. We make one of the rules of the game. That is what we do in all our labor laws, in our pure-food laws, etc.

This suggests in the United States the subject of interstate competition and, for the world as a whole, the subject of international competition and its bearing upon the general level of competition. Just as we cannot in local matters rely upon voluntary effort, because we have the problem of the twentieth man who, through the force of

competition, tends to drag others down to his own mean ethical level, so it would seem that in one state or nation we cannot rely upon other states and nations to establish as high a level of competition as we might desire. This subject has been agitated more or less for three quarters of a century, but so far little that is very tangible has been reached. An International Labor Conference was called by Switzerland fifteen years ago, but Switzerland gave way to the German Emperor, William II, and a congress was held in Berlin, March 15 to 29, 1890. But the first international treaty designed to protect labor is that between Italy and France dated April 15, 1904. A beginning has been made and that is all that we can say. Fortunately up to the present time it has not been clearly demonstrated that any nation or even a state within a nation has suffered on account of a high level of competition. Success in competition depends upon the kind of man who is engaged in industrial pursuits, and a high level of competition naturally means a larger and better man, and consequently an ability to maintain one's own in competition. Generally speaking it is those nations and those parts of nations which have done the most for the workers that are most dreaded in competition. It must be admitted, however, that as we draw closer and closer together in our economic life and as world economy gains relatively upon national economy, the problem of international economic legislation, particularly international labor legislation, gains in importance.

The presence of monopoly in modern industry is one of the facts revealed by a survey of industrial history; monopoly has existed in the past in all civilized countries as well as in the present. In a study of the industrial history of England we come upon the words "monopoly" and "exclusive privilege" on almost every page of that history. The ceaseless iteration of the terms becomes almost wearisome. So far as monopoly itself is concerned, meaning thereby exclusive control over some portion of the industrial field, we have no new thing. The character of monopoly has simply changed with the progress of industrial evolution. The significant monopolies of our own time are those which are extra-legal. They have not grown up as a result of the intention of the lawmakers nor indeed have they come as a result of any conscious desire on the part of society as a whole. Certain industries have shown monopolistic tendencies by virtue of their inherent properties, and there is an increasing tendency in civilized countries to recognize this fact and to make these pursuits, the so-called natural monopolies, also legal monopolies in order to prevent waste and to secure certain gains resulting from monopolistic methods. It is recognized by the common law of England and America and, I think I may say, by what corresponds to our common law in other countries, that private monopoly uncontrolled



is a menace to public weal, inasmuch as it removes the benefits of competition and creates special privileges. Monopoly due to external conditions is not like those extra gains coming to one as a result of peculiar excellence and which are suitable rewards for social service. The monopoly due to external conditions or to facts and forces external to the individual tends, so far as we can judge from history, to repress initiative and invention on the part of the individual. Consequently, the extra gain from monopoly is a gain not for social service but for social disservice. We have rewards either without service or without adequate service. We have then a special privilege which is hostile to the general interest and particularly to the wage-earning classes. The problem then before us is a problem of control of monopoly in such a way that we may remove the oppression of laborers and of others and retain equality of opportunity. This control may be secured either through direct ownership and management of the monopolistic industry or through regulation. We find both methods resorted to. In the case of industries of a routine character which can be carried on in accordance with certain general principles, public ownership seems on the whole to secure better results. It is in accordance with the principles of property to give control, and when we have private ownership and public control we are attempting to unite two antagonistic principles. This is an industrial problem which carries with it a great many subordinate problems. It is enough at this time and place to point out the nature of the problem.

Closely connected with the foregoing is a compact organization, (a) of capital, (b) of labor, also revealed to us by a general survey of industrial history and present economic industrial life. This survey reveals to us, and in my mind demonstrates the futility of efforts to suppress the large organization of capital and the large organization of labor. The only right method can then be to guide and direct both kinds of organizations in such a way that they may subserve the public interest.

What has been said in regard to industrial problems is general in its nature and designed to be merely suggestive. It presents specific problems of industrial society as problems produced by industrial evolution and also as problems which are largely psychical in their nature. The laws and institutions demanded are those which are required to meet the needs of the various classes in the community which are almost infinitely varied with respect to acquisitions, achievements, and capacities. We present one side of the problem when we say that we must create institutions to answer the needs of the various classes in the community. We present a different side of the problem when we say that we must attempt to adjust all members of society by educational processes to their



physical and more particularly their social and economic environment in its highest manifestation. This gives us the dynamic side of our problem. We must not simply attempt to meet the needs of a class with a low average of mental traits and moral characteristics, but we must attempt so far as possible to raise each class to the highest level. We have thus indicated the two great lines of movement of modern nations in their attempts to solve the industrial problems of the present age.





### THE MISSIONARY'S STORY

*Photogravure from the Painting by J. G. Vibert*

This is one of the masterpieces of the famous French painter, Vibert, and was sold in New York some years ago for \$25,500. The scene is in a palace of one of the Cardinals in Rome. Six dignitaries of the church have given audience to the returned missionary, who is apparently telling the story of his experiences in a foreign land in the cause of Christianity and Civilization. The scar on his shaven head is a telling reminder of his heroic struggle, while the coarse dress of his order is in eloquent contrast to the luxurious robes and sumptuous surroundings of his clerical listeners, who are taking light refreshments in various attitudes of prosperous ease.







## SECTION E—THE DEPENDENT GROUP



## SECTION E — THE DEPENDENT GROUP

(Hall 5, September 23, 10 a. m.)

CHAIRMAN: DR. ROBERT W. DEFOREST, New York City.

SPEAKERS: PROFESSOR CHARLES R. HENDERSON, University of Chicago.  
DR. EMIL MÜNSTERBERG, President, City Charities, Berlin.

### THE DEFINITION OF A SOCIAL POLICY RELATING TO THE DEPENDENT GROUP

BY CHARLES RICHMOND HENDERSON

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THE subject of the social treatment of dependents has been approached through several different disciplines, according to the previous training and bias of the investigator and writer. The economists have dealt with the topic as a problem of finance, of public expenditure, and of production, wages, and the distribution of the product of industry. Since the money spent in public relief must be raised by taxation, and since the method of giving relief affects the efficiency of labor and the rate of wages, the economists were right in giving serious attention to this matter.<sup>1</sup> The Poor-Law has naturally been treated by legal writers because it was a vital part of the system of control by governments in all modern countries, especially in northern Europe and the English colonies and their offspring. The "police power" of the state covers this function.<sup>2</sup>

The older "moral philosophy" or "moral science" sought to answer the question: "What is our duty to the very poor, and how can we best fulfill that duty?" In reality that is one problem

<sup>1</sup> Here may be mentioned, among many, Malthus, Chalmers, J. S. Mill, Fawcett, Roscher.

<sup>2</sup> See E. Freund, *Police Power*, 1904.

of what may be called a branch of social science, differentiated as "social technology."<sup>1</sup> For the steps that we take in accumulating facts about the dependent group, in the classification of subgroups, in the determination of causes, in the statistical measurement of misery, and in the definition of social aims, all culminate and find their supreme value in their contribution to the solution of this question: "What is our *duty* to the helpless poor and how may we best fulfill that duty?"

When we come to deal with special classes of dependents we encounter a series of professional disciplines and arts. For example, the care of the insane is a branch of the medical art, and only alienists who devote their lives to this department are trusted to speak with highest authority. This is also true of the public care of epileptics. The care of the feeble-minded, idiots, and imbeciles is chiefly a matter of a pedagogical specialty, although medicine and surgery lend important aid, as in physical culture, the thyroid treatment, etc. The care of normal dependent children is best determined by considerations of general education, and here we are brought into the field of the teacher and to the problems of domestic institutions.

It thus appears that the study of the social treatment of dependents makes drafts on almost all the funds of human knowledge, uses all the methods and results of investigation, and employs in turn all the great institutional agencies of the community.

This essay does not profess to announce for the first time any new discoveries or results of special original investigations as yet unpublished, but rather to mark the present stage of knowledge on the matter before us, and to indicate some of the points on the frontier of experiment and research where further data are needed. If, in thus restating the subject, some slight increment to science may be added, it will be incidental to the main purpose of the exposition.

Any attempt to describe the system of charity even in one country would result in a dry, tedious, and disappointing sketch. The essential features of modern methods fill a large volume, and detailed accounts require many volumes.<sup>2</sup>

It would seem expedient to select a theme which will lead us to consider the most recent and successful endeavor of students of social science, (1) to construct a special discipline which is clearly marked off by its subject-matter and is deserving of independent and systematic treatment; and (2) to consider a method of taking up particular problems of practice, so as to guide experiment into the most economical and promising paths.

<sup>1</sup> My article, *American Journal of Sociology*, January, 1901.

<sup>2</sup> *Modern Methods of Charity Systems*, by the writer and others, Macmillan Company, 1904.



## I

A social policy is not aimless and irrational, but *moves toward an end, seeks to realize a good*. Soon or late social science, in the course of its development and specialization, must encounter the problem of values and standards which does not complicate the studies of inorganic nature, as chemistry, physics, and astronomy, and only incidentally biology. Thus, for example, we are forming judgments as to the best methods of dealing with dependents. What do we mean by "best"? We are really thinking of the welfare of dependents and of the people of the community of which they are members. Many specific ends we have in mind, as the restoration of the sick and the insane to health, or the mitigation of distress when cure is impossible; the improvement of the touch, hearing, sight, and skill of the feeble-minded; the proper nutrition and development of neglected infants; peaceful and quiet existence for aged men and women in almshouses; and many more such purposes. We give social honor and praise to the rich men who endow hospitals, and to the physicians and nurses who faithfully give their lives to the sick. It is evident that modern societies act as if they knew that such ends are rational and worthy.

But there is both theoretical and practical interest in the wider scientific problem: What is the general social end? For we neither know the full extent of social obligation nor the relative value of a particular object or institution until we see the specific action in its place in a comprehensive system of ends. Our theory is incomplete and our system of agencies falls short, and our devices are either superfluous and exaggerated, or halting and inadequate, until our definition of the ultimate purpose of social action and conduct is clear and rationally justified.<sup>1</sup>

Since we cannot, here at least, critically follow this argument to a satisfactory conclusion, we may assume what society actually takes for granted, and what we find implied in all social institutions, laws, societies, movements, governments, that health, sanity, intelligence, morality, beauty, etc., are desirable for every human being.

The standard by which we judge a social policy must be a *multiple* standard, like the compensating pendulum of a reliable clock. The standard here assumed as valid includes the following ideas: (1) Welfare, well-being, analyzed into its various unanalyzable elements of health, wealth, knowledge, beauty, sociability, ethical rightness, and religious faith, is the most general conception involved (analysis of A. W. Small). (2) The welfare of all men, not of a limited class, must be the ideal, the regulative principle. Neither

<sup>1</sup> See Stammer, *Wirtschaft und Recht*.

the political will of a democratic age nor the authority of an ethical philosophy countenances any standard for social conduct which is not universal, purely human. Persons cannot ethically be treated as means to ends outside themselves. No policy which is partial to a family, a dynasty, an order, a church, a class, at the expense of others, can be defended. (3) Therefore our standard is set up for the defense of the helpless child, the undeveloped, the tardy, the incapable; not because of what they can now do for society, but because they are human and have potential capacity for future development. (4) The analysis of social ends shows that we include all qualities and kinds of the humanly desirable. As a nature-object every person must have a certain minimum of food and shelter, and, normally, the race-interest asks for provision for propagation, maintenance, and protection of healthy offspring. Hence the demand of our standard that all capable human beings have a chance to work and produce wealth, material objects of desire. As a psychical person, one who must find his own way in a knowable world, each human being must be taught what he can learn of the knowledge possessed by his community, and his power to learn must be developed. Culture must be many-sided, even in an asylum for idiots or a prison for the criminal. (5) Scientific social ethics transcends merely qualitative analysis of social elements of welfare, and is ambitious to employ mathematics as far as possible in the accurate and quantitative measurement of its standard. Our age is *trying to define at least a minimum standard of life for all citizens*. This process has already gone farther than many citizens are aware. The *standardizing* of weights and measures is a recent addition to the functions and offices of our federal government at Washington, and it marks an advance in the technical arts. At many points<sup>1</sup> we are seeking to standardize the conditions of welfare of human beings. Naturally we are here concerned with a *minimum* standard; if we can discover and fix this measure, the more capable, aspiring, and energetic members of society may safely be left free to enjoy all above that level which they can justly acquire and rationally use.

At this hour no rational (scientific) standard for the minimum income of wage-earners has been generally accepted. (1) The rough rule of average employers is "the law of supply and demand;" which law actually leads to the destruction of human life on a gigantic scale for the sake of profits. It has no final social justification. (2) The gradation of wages according to the rate of profits is not rational nor equitable. The fluctuations and inequalities under such a rule would be unendurable.<sup>2</sup> (3) The rule of the "sliding

<sup>1</sup> See C. R. Henderson, *Practical Sociology in the Service of Social Ethics*, "Decennial Publications of the University of Chicago," 1902.

<sup>2</sup> *The Outlook*, August, 1904, articles by Messrs. Hand and Poole.

scale," which means that the rate of wages fluctuates with the price of the commodity produced, has no ultimate basis in reason, and does not provide a socially acceptable minimum rate. (4) The rule of the strongest, in the fight between trade-unions and employers' combinations, which gives the advantage to the party which holds out longest, is simply a barbarous makeshift, with a rational standard far in the dim background. And where unions and combinations do agree the result is simply more hardship for the consumers, and bears with greatest weight on the very poor. (5) *The only rational starting-point is a minimum standard below which public morality expressed in sentiment, custom, trade-union regulations, moral maxims, and law, will not permit workers to be employed for wages.*

As I have elsewhere discussed this minimum in relation to the industrial group, it remains only to indicate the contribution which charity work has made to the discussion of a standard. The dietaries of asylums, orphanages, hospitals, and prisons are the outcome of a long series of experiments in chemical and physiological laboratories, in army and navy, in camp and mine, as well as in these institutions of charity and correction.

One field for the adoption of a standardized minimum remains to be cultivated, that of adequate outdoor relief to needy families in their homes. The stupid complacency with which only too many public officials and private benevolent societies pretend to relieve the destitute, while leaving many of them still partly to depend on begging, theft, or vice, is a sad commentary on the state of knowledge in this region. One result of this unscientific guesswork, where measurement is already possible, is that much public money is spent on the burial of pauper children which should have gone to feed and nourish them into vigorous producers of wealth.

Charity, in American cities, is far behind its task. It does not even have knowledge of those who need its aid. Under the "Elberfeld" system there are friends of the dependent in every small district of the city, and the individuals on the border of suffering can easily find their way to a helper. In America the public funds are frequently accessible only in one central office, and even when there is outdoor relief it is limited in amount.

There are many people in comfortable circumstances, and many charity workers, who think that our American charity is very nearly adequate. This optimism, I believe, is not based on facts, and is positively a barrier to necessary improvements. My own conviction is based on long personal observation and on certain professional testimonies and statistical data. For example: Physicians who practice among the poor frequently report sickness and mortality which arise from "starvation diseases." Teachers of public schools in poor quarters make similar statements. The London and Chicago

measurements of children in reformatory schools show an enormous ratio of dwarfed, underfed children. The reports of boards of health in American cities contain evidence of the same conditions.

A very common answer of some charity societies to this charge is that they are able to give relief to all applicants. But, with these facts before us, the answer is not decisive. People by the tens of thousands are trying to exist and bring up children in homes which are unfit for human habitation, and on food which is insufficient to meet the minimum requirements of growth. They do this because they either do not know where to apply for help, or because they know that, unless actually ready to perish, they will be treated as able-bodied and "not needing relief," or because they prefer to suffer from hunger and cold and disease rather than ask alms.

I do not claim that charity should attempt to relieve all distress. No doubt the idleness and vices of men produce much misery which philanthropy cannot reach. No doubt moral reformation and schemes of thrift, insurance, education, and general sanitation will in time remove many of the causes of this distress. But what I urge is that we do not now realize the actual enormity of suffering from poverty, that our methods of finding out are very inadequate, and that our optimism is as cruel as it is unscientific. So long as many influential charity workers are teaching rich and well-to-do people that we are almost at our goal we shall never awaken the public to put forth the necessary effort to cope with the overwhelming evils of extreme need in our industrial centres.<sup>1</sup>

The present efforts of the permanent Census Bureau of the nation, supported by the National Conference of Charities and Correction, by the National Prison Association, and by all experts, to collect continuous and reliable statistics relating to paupers and criminals, should be supported by all citizens. It is to be hoped that funds will be furnished to professors and students in university departments of social science for investigations in this field.

It might be thought that the elements of welfare in the higher regions of intellectual, esthetic, and moral culture are too refined, indefinite, and ethereal to be standardized. But all countries which have compulsory school attendance, at least up to a certain age, declare thereby that they have adopted a minimum standard of education; and they compel competitive exploitation of youth

<sup>1</sup> One illustration of an attempt to fix a minimum standard may here be given: "Dr. Frankel, of the United Hebrew Charities of New York, in a study of income and expenditure of a family just above the line of dependency, shows the disbursements for one month to have been about \$32, the receipts from all sources (including \$5 from lodgers) during the same period were from \$33 to \$35." Solomon C. Lowenstein in *Jewish Charity*, June, 1904, p. 210. See also, Charles Booth, *Life and Labor*; Rountree, *Poverty: a Study of Town Life*; F. T. Devine, *Principles of Relief*. Dr. Devine's book was not yet published when this paper was written.



to wait for maturity of body and mind. Child-labor laws are themselves the definite legal expression of a mathematical measurement of a social duty.

The trade-union world is stating its minimum standard more and more definitely, and insisting on it with courage and constancy, though sometimes also with acts of lawlessness and atrocity which show disregard of community welfare. This minimum standard includes such factors as the eight-hour day, the sanitary work-place, protected machinery, the age of beginning apprenticeship, and a minimum rate of wages for each branch of industry. The effect of the successful and general application of this standard upon the incapable and the feeble deserves our attention; but the enforcement of the minimum, being a community interest, should not be left to trade-unions, but should be, as far as possible, a matter of law and governmental action.

In the maintenance of this minimum standard we are compelled to face the problem of immigration of foreigners whose standard of living is below this minimum. So long as hordes of this class are permitted to come freely to America, to live herded in unfit habitations, and to compete for places with our naturalized citizens who have already won an advance, the case is hopeless for our own people.

Uncritical and traditional requirements of ethics produce an unreasoning sentimentalism which wreaks injury upon the race. The ethical demands of the future will become more exact, more capable of explanation and justification, because they will rest both upon inherited instincts of sympathy and also upon calculations of the consequences of methods on social welfare in our own and coming ages. Many of the moral standards of our times need to be profoundly modified by this process of scientific testing and experimentation.

## II

The general form of our present problem is this: What is the best system and method of promoting the welfare of the dependent group considered as a vital part of the entire community? It is chiefly a problem of technique. This technique is a mode of action by a community. It is known and has its reasons in relation to the rational order of society. It can be taught and learned, for it is taught and learned. Hence it is a subject of science and has won proper recognition as a topic in this Scientific Congress. This technique is learned originally as other scientific conclusions are reached,—by systematic observation of social phenomena, by induction from facts, by performing experiments with methods under varied conditions, by inventing working hypotheses and putting them to the test of reality.



We are students of causes in a rational system of life; only we are trying to discover forces and conditions which will bring about a desired result, and we are not merely trying to explain a fact completed. We set before us not merely an effect to be accounted for, but a state of society and of persons which we desire and will to produce, on the ground that we represent it to ourselves as desirable. We are mentally adjusting a system of means to good ends, and not merely looking for the process by which what actually exists once came to be. One of these processes is just as truly scientific as the other, although the difficulty of prevision and provision is greater than that of explaining the past.

### III

#### *Elements in a Social Policy relating to the Dependent Group*

(1) We need to *distinguish* as sharply as possible, both in social thought and action, the members of this group from those who belong to the industrial group. Perhaps one of the most disastrous forms of mental confusion is that of confounding these two groups and so treating them alike. The dependents have long been played off against the wage-earners, and are even now frequently used to lower the standard of living of the competent so as to reduce many of the self-supporting to beggary, shame, and demoralization, with a long train of vicious consequences through heredity for the future race. The typical historical example here is the national degradation which threatened the English people before the reform of the poor-law about 1834, when poor-relief was given as a supplement to wages, with the consequence that all common, unskilled laborers were fast becoming paupers as a condition of mere existence; and pauper labor proved to be incapable of producing wealth enough to support the nation.

But we do not have to go so far to discover flagrant illustrations of the same tendency, even in the fortunate economic conditions of the United States. There has not been an important strike in the past decennium, involving large numbers of low-skilled laborers, when charity-supported or charity-assisted persons or semi-criminals did not offer themselves in crowds to compete with the strikers.<sup>1</sup> The "parasitic industries" are found in all cities, that is, industries in which the income which supports the family comes partly from wages, partly from charity, partly from vice, and partly from the physical and moral capital of the next generation.

Under a previous head the minimum standard of human existence has been defined as closely as the nature of the subject and our

<sup>1</sup> It is notorious that many of the professional "strike-breakers" are of the vagrant class, on the borderland between vice, pauperism, and crime.

present knowledge permit. The critical test lies here: Those who can earn the minimum in competitive society belong to the industrial group; those who cannot earn this minimum belong to the dependent group. This is a rough measure, but it is far better than no standard, and it is practically correct. In fact, it is already more or less consciously applied in every instance where public poor-relief is given. Of course, no thoughtful person will take us to mean that there is an impassable barrier between the two classes, so that dependents cannot be helped to ascend into and remain in the industrial group; and there will always be some difficulty to decide the status of those on the border-line.

The members of the dependent group, who cannot earn even the minimum wage necessary to a human existence, are now actually supported by society; but frequently, and on a large scale, in such a way and by such methods as to keep them down and drag others to their level. For example, the products of charitable and correctional institutions are sometimes put upon the market in such quantities and massed at such points as to reduce the wages of self-supporting work-people below the level of the minimum. In the sewing industries very serious evil is thus introduced.

(2) A social policy relating to the dependent group must isolate the criminal group. One of the plagues of public and private charity is the anti-social criminal, the sturdy rogue and vagrant, the debased drunkard, the cunning thief, who mix in the throng of the merely dependent and appropriate by impudence or craft the fund intended for the helpless and incapable. At the door and desk of the municipal lodging-house may be seen daily the sifting and judging process — one of the most delicate and difficult tasks which ever test the judicial faculties of man. The same problem often confronts the friendly visitor in the homes of the poor, — as when one is called to help the wife and infant children of a lazy or absconding husband and father.

Recent experiments and discussions at this dividing-line have shown that the rough and ready, but overworked, "work-test," even as a "workhouse test," is but one factor in the best method. One difficulty is that the motley multitude called the "unemployed" is composed of unlike elements, the vagrant, the inebriate, the petty unsuccessful thief, the burglar "down on his luck," the physical degenerate, the enfeebled convalescent just staggering back from a hospital, the stranded country youth, the unskilled laborer seeking a job without trade-union card, and others; some with hard palms and thick muscles, some with deft but delicate fingers, some accustomed to cold and heat, some with prophetic cough ready to perish with slight exposure to sun or storm.

In order to treat with fairness, discrimination, wisdom, and

humanity all these "unemployed," and to transfer to the machinery of the criminal law those with whom charity cannot deal, several tests are necessary, and a merely automatic, mechanical method is totally irrational. (a) First of all a judicious, firm, courageous, and humane agent is necessary. The evil of depending entirely on a single coarse test, as the stone-pile, the bath, the workhouse, is that it seems to make the man unnecessary. It has long been observed that in an asylum for the insane where all the patients are kept within steel cages, one or two brutal attendants can carry out the policy; but where freedom, fresh air, play, industry, and rational treatment are given, the hospital must have many gentle, strong, and trained nurses. So exclusive reliance on a stone-breaking test tends to place surly and cruel keepers in charge of all applicants for shelter and aid, and thus the institution designed for charity and justice becomes an insult to honest workmen and a discouragement to the sensitive, without furnishing the quick insight which most unerringly discovers real criminals. (b) The work-test, in many forms, is only one useful method which works well under good direction, since crime is as parasitic as pauperism, and the mark of the parasite is that he wishes to live at the expense of others. (c) The employment bureau, with a reliable record and a sharp watch-care, is another means of marking the industrious man and discovering the cheat. (d) In cities, and often in towns, a certain amount of personal guardianship, a kind of probation work, is necessary to hold a moral weakling back from sliding down the easy incline toward criminality. All this information which is necessary for a wise treatment must be collected instantly, by means of messengers and telephone and telegraph, and from every available source. For the moment when a man can be helped and turned away from beggary or crime is the moment when he is under treatment and within the grasp of the official. The German *Verpflegungsstationen*, with their simple inns and their system of certificates and records, have much to teach us.

But whatever the tests employed, in some way the members of the criminal group must be distinguished, known, and isolated from the dependent group. Charity, public or private, has no machinery of compulsion, and ought not to have. The steamboat is not made to sail on land; the school-house is not constructed to hold burglars in confinement; and a charity bureau is not fitted for the task of managing deserting husbands, petty thieves, and confirmed inebriates. Society must erect specially adapted machinery for dealing with this class of men, and it must have agents trained for each particular branch of its service.

(3) Part of our social policy must be a *better understanding between the public and private agencies of relief*. So far as principles of administrative methods are concerned there are no radical differences,

both must aim at the real good of the recipients and of the community. It is also true that the division of labor need not be the same in every state and every county or municipality.

But the necessity of agreement and coöperation is easily illustrated and demonstrated from examples taken from practice. Thus private charity sometimes supports a feeble alien who has been rejected by the agent of public outdoor relief until he has gained the rights of settlement and becomes henceforth a public charge; and this happens even in states where it is a punishable offense to import a pauper from one county into another. This understanding should go far enough, in cities where there is legal outdoor relief, to secure for the salaried agents the assistance of voluntary, unpaid, friendly visitors. Our public relief in American cities sins against the fundamental principle of individual treatment, because it refuses thus far to learn from the German cities, which employ unpaid visitors and give to them, within certain regulated limits, the responsibility for the distribution of public funds.

The essential principles of division of labor seem to be: (1) the relief which is required by law is only that which is necessary to life and industrial efficiency, while private relief can deal with exceptional cases and provide a measure of comfort; (2) public relief is more suitable where there can be common, general regulation; private relief is more adaptable and can act in exceptional ways; (3) public relief may properly provide for permanent and universal demands; private relief, being optional and voluntary, may rise to meet changing situations, and hence can more readily try experiments for which the voting public is not ready to expend money or erect administrative machinery.

But division of labor is only one aspect of social coöperation, and it really implies and demands a conscious and concerted effort to work for the common welfare. This division of labor and this coöperation require organs and agents to make them effective. In German cities the initiative is naturally taken by the municipality; in American cities it must at first be taken by the Charity Organization Society or some kindred association.

(4) A social policy relating to the dependent group must include an extension of experiments with positive social selection. Each year competent thinkers come nearer to agreement on this principle, although it is not so clear that we have yet hit upon the most effective devices in its application. It is more than formerly assumed that persons who cannot improve, or at least will not degrade, the physical and psychical average of the race, should be prevented, so far as possible, from propagating their kind. Accidental and sporadic deflections downward from the average would still occur; but one of the principal causes of race-deterioration would cease at the source.



The device of extermination by painless death has not been seriously discussed among the competent.

The device of *sterilization* has been frequently suggested, and, in a few instances, chiefly on the ground of advantage to the individual, it has been employed. There is nothing absurd, cruel, or impracticable in this proposition, although it would be helpful only within a limited area at best, and would not make segregation unnecessary, since even a sterilized degenerate can do injury by example and actions. It could be useful only upon the recommendation of a medical administrator and in the case of persons isolated from social contacts.

A beginning has been made with the device of the custodial colony for segregation, already in quite general use with the insane, the feeble-minded, the epileptic. The idea is not absolutely new, but the scientific grounds and economic methods have not yet been worked out in a way to frame a cogent argument and appeal to electors and legislators. We must still interpret the partial and tentative experiments already made so as to throw light on extended applications of the principle. Until the entire community, or at least the governing majority, has accepted this policy with open eyes and united will, we must expect to pay the heavy costs of neglect.

Conviction of the importance of a rational and humane policy of social selection has been diluted, and aggressive effort has been delayed, by certain widely accepted errors. Thus we have a large number of citizens who cling to the belief that "natural selection" is adequate and preferable. They speak of the "evanescence of evil;" they cite the high rate of mortality of starved and sick infants, the sterility of prostitutes, the frequent celibacy of vicious and criminal men, the disappearance of degenerate families, the ravages of alcoholism and disease among the neurotic and inefficient. Doubtless, as was long ago abundantly illustrated by Malthus, misery, pain, weakness, vice, do tend to extinction without any conscious, concerted, and rational effort of the community through law. Why not leave the weeding-out process to these destructive agents and forces?

False modesty has been an important factor in hindering the calm and reasonable discussion of the selective process. Ignorance of biological science has contributed to the obstacles in the way of progress. We need to consider what the waiting, *laissez-faire* policy involves in order to understand why a humane society will not always stand by without a positive effort to modify the process and reduce its cost. It would mean, first of all, that hundreds of thousands of our fellow men who fail in competition would starve or freeze before our eyes in our streets. Among these would be innumerable



innocent little children and helpless old men and women, unfortunate and crippled veterans of the army of labor. We do not need to depend on imagination for a knowledge of the effect of such conduct. It is what Bill Sykes did, what miserly stepfathers and heartless tyrants have done. The king who heard that his subjects had nothing to eat, and sent word that they were welcome to eat grass, was inviting a revolution — and it came. Hunger breeds despair, and those who are left on the verge of starvation have nothing to risk when they steal and rob, or set the torch to palaces, and rob public stores and granaries in the glare of conflagrations.

The instinct of sympathy is too deep and general to permit neglect. The moral obligation of charity is now with us organic, institutional, and fortified by ethical philosophy. While we cannot "prove" it, as we can a physical cause of disease, we can show to all who are capable of appreciating the argument that charity is an essential factor in a rational view of life and the universe. In spite of the powerful and influential protest of Mr. Herbert Spencer, the civilized nations have gone on their way of extending the positive agencies of benevolence. The let-alone policy is impracticable. Evidence is accumulating to prove that charitable support, without a positive general policy of segregation and custody, is, in the case of those who are seriously defective, the certain cause of actually increasing misery by insuring the propagation of the miserable. We cannot go backward to mere natural selection, the process which was suitable with vegetable and animal life, and inevitable in the stages of early human culture. Nor can we rest with merely mitigating methods of relief. We are compelled to consider devices for direct elimination of the heredity of pauperism and grave defect.

Fortunately we have already discovered that an effective colony method is technically and economically possible, humane, and financially advisable. For example, it is not difficult to estimate the average cost per year for the support of a feeble-minded woman of child-bearing age in a farm colony where all the inhabitants work, learn, play, but none breed. If she were free to roam, the county or state would have during these same years to support the woman and her defective illegitimate children. The future generations of "the Jukes family" are in sight, and the burdens they will bring. We know the effects of these two policies; they "spring to the eyes." The method of segregation, as a device of negative social selection, is already at work and its results are before us. Gradually, tentatively, carefully, the method will be employed with others, as they are found to be manifestly unfit for the function of propagation and education of offspring; from the insane and feeble-minded society will proceed to place in permanent custody the incurable inebriate, the professional criminal, the hopelessly depraved. The marriage of consump-

tives and of others with feeble constitutions will be increasingly diminished under pressure of enlightened public opinion.

But the policy of segregation is applicable only within rigid limitations. Only those members can be cut off from family life and social freedom who are manifestly unfit for parenthood and for contact with fellow citizens in competitive industry. Many of the children of criminals may be so nourished and taught in a new domestic environment as to become valuable citizens. But society cannot afford to play the nurse and teacher for a very large horde of incapables and criminals. The cost would be too great and the sacrifice would fall on the wrong parties. It is in the improvements and reforms which promise the elevation of the group not yet either pauper or criminal that we may most reasonably hope to secure the best returns for our efforts. Something may be done to compel parents now negligent to perform their duties as parents and make better use of their wasted resources. The extension of probation work to parents, already begun in some of our juvenile courts, is a hint of what may be done.

(5) Not even a brief outline of a social policy relating to the dependent group can omit reference to the agencies of "preventive and constructive" philanthropy. Omitting details, yet bearing in mind the impressive array of inventions in this line, let us seek to define the essential regulative principles which at once inspire and direct these methods.

Pauperism is, in great part, the effect of known and removable causes. These causes are not obscure, concealed, or beyond our grasp. They are consequences of human choices which may be reversed. The reception of alms even in cases of innocent misfortune, is a social injury; it lowers self-respect, weakens energy, produces humiliation and mental suffering, diminishes productive efficiency, tends to the increase of pauperism. Hence those who know most of relief are most desirous of reducing the necessity for it to the lowest possible terms.

The National Consumers' League and the recently organized National Child Labor Committee represent a policy of prevention which is full of promise. It is perfectly clear to all competent observers, who are not blinded by some false conceptions of personal financial interest, that the vitality, industrial efficiency, fitness for parenthood, and intelligent social coöperation of the rising generation are profoundly affected by neglect of the children of the poor. In order to prevent juvenile pauperism and youthful vice and crime, the entire nation must work steadily to introduce and make operative something like the following programme of legislation and administration:<sup>1</sup>

<sup>1</sup> Suggested by the paper of Mrs. Florence Kelley, published in the *American Journal of Sociology*.

All children must complete the first eight years of the common school curriculum and attain a certain standard of education before they are permitted to engage in bread-winning occupations, and none under sixteen years should be wage-workers unless this standard has been reached.

All children, when they begin work, should be examined by a public physician, and held back from intense labor if in weight, stature, and development of muscles and nerves they are dwarfed. Physicians and nurses should be charged with the duty of seeing that school-children are kept in good health.

All defective, deaf, and subnormal children, as well as the crippled, should have proper separate and special instruction.

Boards of education should provide playgrounds and vacation schools, under careful supervision, in order to prevent the evils of idleness, misdirected energy, and vicious associations.

Public libraries should extend their branch work, not only to different districts of the city, but, by means of home library agencies, into the very homes of the poor; and the easy and pleasant use of the English language should thus be promoted.

The street occupations of boys should be carefully regulated and supervised, and the employment of girls in public ways should be prohibited.

Boys under the age of sixteen years should not be permitted to labor in mines or with dangerous machinery.

If parents and other adults are in any way responsible for the delinquency of children, they should be held penally responsible.

At the same time, the curriculum of the schools should be so planned as to lead by a natural transition from the play and study of childhood to the specialized industries of maturity, by means of evening schools, technical instruction for apprentices, regulation of hours and shifts, so that youth may lay a broad foundation for the specialization of the factory and mill.

Among the methods of preventive philanthropy is that of new applications of the principle of averaging risks or "insurance." The only nation which has thus far developed a system as comprehensive as social need and as our present social science justify is Germany, and any discussion which ignores that splendid system must be regarded as tardy and provincial. No doubt each country must construct its own system, but any legislature which neglects German experience and success falls short of the best wisdom.

Sickness being one of the chief causes of dependence, all recent improvements in hygiene and sanitary science, with their practical applications in municipalities, must be counted among the direct

means of preventing pauperism. The contest with tuberculosis is a familiar and happy illustration of labors in this field.<sup>1</sup>

(6) Philanthropy would still have a large and even higher mission if the commonwealth could by a stroke abolish pauperism in all its present forms. Philanthropy will never become obsolete, but will merely move up to higher levels. There will always be superior and inferior; stronger men in advance, feebler men in the rear; but all will be members of the same community, knit by economic, political, and moral ties into one organization. Already the condition of social dependents is far higher than it was a century ago. When actual misery and depravity have been abolished, if that time ever comes, there will still be work for the most successful on behalf of those less gifted. Much of our charitable work is already on this level. In rural communities the desperate and tragical struggle with shameless pauperism is often absent; there are no "poor," none dependent on public or private relief; yet in many villages the higher charity has a very earnest mission. There are still spiritual and intellectual dwarfs to be stimulated; gossip dissipates; low vice lurks in unsuspected places; and those who lag in the rear hinder the march of the most advanced.

The philanthropic measures which have been developed in presence of pathological phenomena have reacted upon normal activities. Thus, for example, the methods of studying and training the feeble-minded and the juvenile offenders, and the vacation schools for summer vagrants among children, have made substantial and appreciated contributions to the science of education.

Crises in commerce and industry are felt to be pathological; but a scientific study of crises reveals the principles which should regulate ordinary business in such a way as to avoid widespread financial ruin, as rules and laws controlling the issue of currency, the straining of credit, and the fluctuations in the production of commodities.

The labors of the philanthropist awaken and sustain those social habits of thought and sympathy which elevate and ennoble family life, refine customs, and inform legislation with a universal moral aim. Medieval charity was full of blunders, but its failures are our warnings, and its spirit of devotion inspires us through the literary monuments of its typical heroes. In a similar way the institutions and laws which public and private charity are now constructing will shine over the waste of years a veritable pharos for the centuries to come.

<sup>1</sup> Other illustrations are given by Dr. E. Münsterberg in his paper.



## THE PROBLEM OF POVERTY

BY EMIL MÜNSTERBERG

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POVERTY means a condition where there is lack of the necessities of life. The preservation of the life of the body is a necessity, and the man who does not possess the means necessary to such preservation is poor. Whether it be directly through starvation, or indirectly through sickness brought on by insufficient nourishment, poverty must necessarily lead to the extinction of the physical life. The individual's instinctive love of life will not allow him to submit to this result without resistance, and so in one way or another, according to the circumstances in which he lives, he struggles against it. He will either beg the means of subsistence from his fellows, or, if this fails, he will resort to fraud or force in his efforts to obtain it. This means that he will strive to escape want by secret or forcible appropriation of the necessary means of subsistence. But so far as begging and force fail, whether it be because his fellow men are also poor, or because they take sufficient precautions to protect themselves against fraud and force, so far the condition of poverty continues to exist, and that consequence of physical degeneration makes its appearance which penetrates the whole being through disease, through moral neglect, and through embitterment of soul. Where wider circles of population fall into this condition we speak of collective poverty, in contrast to individual poverty.

There is this great difference between poverty and all other human conditions, that the man who suffers from it has at his disposal no means of resistance out of his own power; that here there is no service rendered which furnishes a claim for a counter-service, as is the case in all other human relations. Hence, when help is rendered to the poor, be it by the individual or by society in its various forms, the question is always of a service without return. For this reason, therefore, such service cannot, without further ceremony, be left to the general principles governing economics and equity which otherwise regulate the relation between service and counter-service. There are many other points of view on which the necessity of helping the poor is based. They may be briefly classified as "philanthropic" and "police." The spectacle of a human being suffering from want is so affecting that it calls out the feeling of sympathy which impels



his fellow men to help. From the standpoint of the police, however, the impulse evoked is almost the direct opposite — that of self-protection.

When an indigent, through need of the necessary means of subsistence, resorts to fraud or force, he can do this only through a breach of the law. Society, which imposes a penalty on such a breach of its laws, must guard against allowing such law-breaking, committed through the force of a natural instinct, to have the appearance of being justifiable. Means must be taken to anticipate such an instinctive action by voluntarily supplying the poor man with the means of satisfying his natural wants. The history of poverty furnishes numerous proofs of the fact that the instinct of self-preservation is under all circumstances stronger than the fear of penalty. The whole of the measures by means of which it is sought to alleviate the many and varied conditions of poverty, we designate "poor-relief." No civilized state is without such measures, although in various countries they have undergone a very different development. Their foundation is laid by a feeling of fellowship, which at first centres in the church parish and is directly shown by the members of the parish toward one another. Hence the custom passes over, as a religious exercise, to the church itself, which comes to recognize a definite religious duty toward the poor. It also grows up out of that feeling of fellowship which neighbors have, manifests itself in the mutual help of those bound together by a common occupation or calling into orders of knighthood, religious orders, merchant and trade guilds, unions, brotherhoods, and associations, and finds its final comprehensive expression in the recognition of the duty of poor-relief through political organizations, church, province, state. Yet its actual development assumes very different forms. In the Latin countries the exercise of poor-relief and charity continues to centre really in the church. In the Teutonic countries, on the other hand, it develops from an ecclesiastical to an ecclesiastico-civil, and then gradually to a completely civil, poor-relief. In keeping with this development, the ecclesiastical poor-relief in the Teutonic countries remains still in a mere modest, supplementary position, closely confined within the limits of those bound together by a common creed. The opposite is the case in the Latin countries. Here charity, which is administered through churches, monasteries, religious orders, and charitable endowments, is supplemented by state and parish measures. The traces of this historical development are to be found in numerous halfway forms. For example, even in the England of to-day the public poor-relief is administered by unions which correspond to the several church parishes. In the French *bureaux de bienfaisance* and in the Italian *congregazione di carità* the interest of the community at large finds

expression in the fact that the mayor is the chairman of these associations.

To these public and semi-public forms of poor-relief there is added an immense number of private charities, which either pursue precisely the same object as the former, or else supplement them in some way or other. Their promoters are either single individuals or societies and associations. Above all things, the standpoint of humanity is predominant among them, although this takes different forms of expression at different periods. The simple command to love one's neighbor, which makes it a duty to help one's suffering fellow beings, expresses itself in almsgiving and penitential offerings in the medieval church, where the spiritual welfare of the giver is the idea in the foreground, rather than the need of the receiver. The charitable foundations of the cities that grew up after the Reformation are the expression of a powerful sense of citizenship, which feels itself able to do more for its impoverished members than afford them mere sustenance. The period of rationalism which set in about the middle of the eighteenth century transformed the Christian idea of love of one's neighbor into that of pure humanity. And still to-day impulses to relieve suffering are produced by motives of the most various kinds. The means to this end are pouring in to-day as they have never done before. The applied methods of relief, especially where sickness and infirmity are concerned, have reached a degree of excellence all out of comparison with that of any previous period. How much also poor-relief has extended its scope, increased its means, and improved its methods! The method of poor-relief in itself, however, can boast of no progress. It was and continues to be an indispensable, but always crude, means of contending against poverty. So far as we can speak here of progress at all, it is not to be found within, but rather without the proper compass of poor-relief. It begins at the moment when poverty is no longer reckoned with as a condition established by the will of God, or as a necessary fact of human existence; and the question is thus raised whether poor-relief itself cannot be absolutely banished from the world by the absolute abolition of poverty itself, and, without prejudice to the physical and mental inequalities in natural gifts which divide men, by the removal of that monstrous inequality which exists in the things of this life. From this point of view the problem of poverty is a problem of economics and sociology which investigates the whole relationship of man to man and to nature about him, and whose final aim must be to render to all an equitable share in the treasures that are to be wrung from nature through work, and also, by the creation of universal prosperity, to banish poverty from the world as the very contradiction of such prosperity.

With an insight into this connection of the matter there begins a new conception of social and economic events. We hear at the close of the eighteenth century of the great doctrine of individual freedom. All legal obstacles which set bounds to this movement must fall. It is taught that, as soon as every one has liberty to unfold his own powers, the greatest possible guaranty of universal prosperity is attained. But the new economic development which, under the banner of steam and electricity, leads the way to a new era of discovery and invention, in reality created colossal riches on the one hand, and appalling poverty on the other. Poverty is not removed, but increased, and in its opposition to riches appears still sharper and more pressing. Man's ability to work has become an article of sale, which, according to the law of supply and demand, displays a tendency toward continuous depreciation as population increases. So economic freedom becomes the freedom of "sweating," which receives only the slightest check from the good will of philanthropists. The immense pressure from above calls forth the counter-pressure from below. As their feeling of self-consciousness develops, the laboring classes seek to realize themselves as a unity, and in their wishes, needs, and point of view to oppose themselves to the employing class. One can speak of this movement among the laboring classes as something quite new in the history of sociology and of the world. This does not mean that there ever was a time when the struggle of the impoverished classes to improve their social and economic condition had no existence. But no movement has seized hold of such great masses of people. First of all, the modern means of communication and the press, together with a universal political freedom which has, in spite of every obstacle, made great advances, have been the powers which have given that solidarity to modern labor which is its peculiar characteristic. This movement of labor to realize itself as a great unity gives rise to the modern social problem of which the problem of poverty forms a part. As a part of the social problem it assumes a new aspect. The conception of poor-relief, in the old sense of the term, is entirely foreign to the labor programme, the first principle of which is self-help; not pity, but justice; not a prayer, but a claim.

This social conception of the problem increases the difficulty of treating it, because the attention is now directed away from the outer appearance of poverty to its deep-lying cause, and the trouble now is to find those measures through which the cause of poverty may be counteracted. We are accustomed to classify the causes of poverty as "general" and "particular." The former comprise events over which the individual has no influence, such as the whole organization of state and society, business crises, wars, discoveries, and inventions which revolutionize a whole branch of industry, such

as especially the replacing of hand labor by machine labor; further, destructive events of nature, such as earthquakes, conflagrations, inundations, epidemics, etc. Through all these causes numberless individuals are simultaneously rendered penniless and countless families deprived of their bread-winners. The particular causes of poverty are disease, infirmity, old age, etc., which are again to be distinguished as those for which the individual is responsible and those for which he is not responsible. For idleness, prodigality, drink-mania, and unchastity he is responsible; for youth, old age, sickness, and infirmity, and death of the bread-winner he is not responsible. Yet a sharp line of distinction is not to be drawn here. A bad course of life, for which a vicious bringing-up is to blame, is something for which, in a higher sense, the individual is not responsible. Moreover, a similar consideration will show us how the individual case broadens into the general. Take, for example, the problem of criminality among the young, a problem which has lately been the subject of especially earnest consideration and which is bound up with domestic conditions. In like manner, the sickness of the individual assumes a general importance when the condition of dwellings, the general diet, etc., deteriorate the health of the population. And if the state of dwellings and food have such a result, there forces itself to the front the question of wage and labor conditions which do not allow a sufficient expenditure for food and dwelling. And from this wage and labor question we are immediately led back to the question of economic and social conditions. In short, we have an immense variety of circumstances produced through causes the ultimate source of which is hidden in almost impenetrable obscurity. Personal, physical, intellectual, and mental qualities exercise a contributive but not decisive influence, where the determining circumstances are more powerful than the will of the individual.

However difficult it may be in particular cases to press back to the ultimate cause, yet the knowledge of the connection between the individual case and circumstances in general affords us points of view for the measures that are to be taken to counteract poverty. Indeed, it is this insight into the indissoluble connection of the single case with the general which gives its decisive character to the efforts of to-day to solve the problem of poverty. The well-worn comparison between poverty and disease here obtrudes itself. It is not a piece of court-plaster fastened over a wound which heals a disease whose causes lie within, but only the treatment of the whole bodily condition, the improvement of the vital forces, the restoration of regular circulation of the blood, the stimulation of the activity of the heart. Thus poor-relief, as a means of protecting the poor from direct want, is only the court-plaster which serves as a temporary relief, but does



not produce a real cure. The farther the measures taken to counteract poverty are removed from this most external measure of poor-relief, the more effective are they. In the first rank stand all those measures which are fitted to elevate the general condition of prosperity. Here belong all those measures which concern public and economic life, commerce, the labor market, the administration of justice, etc., and also the question of protection and free trade, the conclusion of commercial treaties, the extension of the means of communication by land and water. In a similar position stand those measures for the elevation of the public weal through regulations promoting health and education, such as the fundamental demand of universal free elementary schools and of night schools, the equipment of technical, business, and higher educational institutions, the procuring of a good water-supply, the removal of garbage, the supervision of slaughter-houses, a good milk-supply, the promotion of physical training in the schools and homes, the furtherance of the building of sanitary dwellings; in short, those measures which are fitted to improve the mental and physical conditions of all the various classes of population.

The second division is formed by those regulations which have to do with single occupations and classes, especially the agricultural, artisan, and industrial wage-earning classes. Of first importance here is the regulation of the labor conditions, the legal protection of labor, labor coalition, and labor employment bureaus. Side by side with legal regulations, the claim to the highest importance lies with the activity of the independent organizations, of the artisan associations and trade-unions, of producers' and consumers' leagues, of building-societies; in short, of all those associations of laborers in a common field which are built upon self-help as their basal principle, and whose object is the regulation of the conditions of labor and mutual encouragement and support.

The third division has so far to do with the causes of individual poverty as certain circumstances can be foreseen which render the individual, either for a time or permanently, incapable of earning his bread. Such especially are disease, accident, disability, age, widowhood, and orphanage. The most important measures in this division are those comprised under the different forms of labor insurance, divided into sick, disability, old-age, accident, out-of-work, and survivors' insurance. Such insurance may rest chiefly on the basis of legal compulsion, as in Germany and Austria, or on the basis of friendly societies, as in England and America; which, however, are to be found in the first-mentioned countries also. Labor insurance stands in its effects next to poor-relief, in that in single cases it removes or mitigates the consequences of penury. It has this difference, however, from poor-relief, that here the claim is based



on the ground of an acquired right. On a similar basis rest the claims on the state, church, and corporations for pensions, retiring allowances, or maintenance of widows and orphans.

Sharply divided from these measures for the advance of general prosperity, of self-help, and of social prophylaxis, there exist, in the last place, the measures against poverty which constitute poor-relief proper. The man whom these general measures for the public good have not been able to prevent from falling into poverty, who, in the case of lost capacity to earn his living, or want of work, cannot fall back on the help of those upon whom he has some special claim, nor has the right to claim help from insurance, — such a man has no other resource than to accept outside help, which is offered by poor-relief and charity, a help which has this peculiarity that it stands outside the compass of that reciprocal service which determines and sets definite bounds to all other economic relations. The results of this peculiar relationship are plainly recognizable on the side of both giver and receiver. The giver is inclined to limit his gifts to what is only absolutely necessary, because he gives without return; the receiver is humiliated by the gift, because he can do nothing in return. Hardness on the one side, bitterness on the other, are consequently in great measure bound up with the exercise of poor-relief. And where poor-relief is not administered in this hard way, or where it reaches a lavish or actually prodigal extent, it escapes indeed arousing the feeling of bitterness, but produces in its stead other and no less dangerous evils, above all the evil of accustoming the receiver to free gifts, of making him covetous, of lessening his efforts to maintain himself out of his own endeavors. Where poor-relief so degenerates it becomes mere almsgiving, which has as its inevitable consequence the unlimited increase of the number of those seeking help. The lamentable fact that heads of families desert their wives and children is really fostered by the feeling, encouraged through the administration of adequate poor-relief, that sufficient provision will be made, without the presence and work of the head of the family, for the maintenance of those dependent upon him. Nay more: where greater riches afford the means of a lavish distribution of charity, the begging of charitable assistance becomes a business which supplies itself with specific expedients in order to secure its share of the superfluous wealth without any effort. The appearance of poverty is feigned. Hypocrisy, lying, and cunning in written and personal representation form the stock in trade of this beggar business, which, estimated by its moral quality, rivals the trade of the card-sharper, receiver of stolen goods, and defrauder.

Thus the conduct of society toward poverty continues to oscillate between two evils — the evil of insufficient care for the indigent, with the resulting appearance of an ever-increasing impoverishment which

acts as an incentive to begging and crime; and the evil of a reckless poor-relief, with the resulting appearance of far-reaching abuses, the lessening of the spirit of independence, and the patronage of begging and vagrancy. The history of poverty is for the most part a history of these constantly observed evils and of the efforts to remove them, or at least to reduce their dimensions. No age has succeeded in solving this problem. In the early Christian Church the duty of poor-relief was based upon the love of one's neighbor, and the members of this community looked upon each other as brothers and sisters whose duty it was to render help to one another. Thus it was possible for a limited circle and for a limited time in some measure to avoid both these evils. But in the Middle Ages the church, now become a public power, encouraged and increased poverty to an appalling extent, without being able in a corresponding degree to meet the problem of helping the indigent. The state authorities during the latter part of the Middle Ages, and especially in the sixteenth and seventeenth centuries, in spite of their stringent laws against begging, remained powerless to contend with beggary and vagrancy. The other course which, with overflowing love and compassion, sought to mitigate the lot of the poor, which finds expression in the Gilbert's Act of England with its system of allowances, or the French law of 1811 concerning the anonymous reception of children, plainly showed, in the appalling increase of the number of able-bodied persons demanding support and of deserted children, where a too charitable conception of the administration of poor-relief must lead. To-day we stand face to face with the same problem. Public poor-relief and private charity wage the thousand-year-old battle over the successful administration of poor-relief and the prevention of its abuses, and reap to-day precisely the same experience as was reaped in times past, — that human nature, in spite of all economic and technical advance, in this respect has undergone no change. Hence also arises the very noteworthy fact that the most modern poor-relief directs its attention more than ever to the simple administration of poor-relief in the early Christian Church, and that the much-talked-about " Elberfeld system " is nothing else at bottom than an attempt to revive that old form of administration on systematic lines. Thus there stands in the foreground of all discussion concerning the proper form of poor-relief the question of organization. If poor-relief is to help the needy according to his need, and have a reason for rejecting the undeserving, it must have for this purpose a thorough knowledge of the circumstances of those who apply for help. This knowledge can be obtained only through direct examination in the home of the indigent, through observing his mode of life, his household management, the conduct of his family, etc.; and must be supplemented by inquiry in other directions, of the

employer, neighbors, fellow-tenants, etc. This makes necessary a special equipment for examination which shall stand in fitting relation to the number of those seeking help. In this regard, the greatest success is displayed by the communities which are able to raise a sufficient number of volunteer helpers who enter into intercourse with the indigent in the spirit of brotherly love. Herein lie the roots and the power of the Elberfeld system, already referred to. The paid helper is perhaps better trained, but he lacks that vital element of love which distinguishes the voluntary helper. It is true that the voluntary-assistance office must have rooted itself in law and custom, as has been predominantly the case in German communities. This custom hardly exists in England and America. Hence the predominance of indoor over outdoor poor-relief in both these countries. In its place, however, America and England can point to a very great development in the sphere of private charity, which centres in the charitable organizations and societies, and offer here wider opportunities not only to volunteer helpers but also to paid workers who are trained by various plans and now by highly developed schools of philanthropy. The most valuable assistance rendered by woman makes itself conspicuous in the sphere of private charity, and leads to the demand, now advanced alike in all civilized states, that in public poor-relief woman shall have equal rights and duties with man.

The method of rendering assistance is closely bound up with the question of the organization of poor-relief. The German preference for outdoor relief is, without doubt, a result of the old custom of employing the help of volunteer assistants. In England the great reform of 1834 established as the very test of indigency the readiness of the applicant for help to enter an institution in which he had to forego his freedom of movement and many of his accustomed enjoyments of life. Whether this demand is expedient or not is to-day a matter of much dispute. The transactions of the National Conference of Charities, and the reports of state boards and of the English Central Poor Board, contain numerous discussions of the matter. That the number of those receiving assistance is lessened by a stringent application of the principle is without doubt. But, on the other hand, it remains doubtful whether in this way adequate relief is in all cases afforded, and whether it is not much more true that the rendering of money assistance to the indigent restores him more quickly to a condition of independence, and that the poorhouse tends to make him a permanent subject of poor-relief. Moreover, it has often been observed that a strict application of the principle of indoor relief leads to an increase of those two evils already mentioned — the want of those who are in real need, but whose pride is too great to allow them to enter the poorhouse; and the resort of the

others to begging and vagrancy, which they find more comfortable and profitable. More than this, neither England nor America would be in a position consistently to carry out its system of indoor relief, were it not richly supplemented by private charity which mitigates the severities of the system. Moreover, an increasing insight into the connection between poverty on the one hand, and disease and immorality on the other, in all civilized countries, and not least in America and England, has had the result of so narrowing the sphere of indoor relief that all those classes of indigents are refused admittance which need special medical attendance, and for whose moral welfare dangers are to be feared from a stay in the workhouse. Above all is this true of the sick and the young. In its relation to the children especially is the development of the system of family relief, and the separation of children from adults, noteworthy. In sick-relief it is a matter of the first importance to render the relief at the right moment to insure the cure of the patient and, where possible, to seize the disease at a stage in which restoration of the power of earning his own living may be successfully accomplished. In this respect the movement for combating the evil of tuberculosis is especially of far-reaching importance.

The question of good organization, as well as the question of adequate relief, is handled by general efforts of the most various kinds, in which public poor-relief and private charity take part in different ways. This very diversity, however, conceals two serious dangers — lack of unity on the one side, and overlapping on the other. To counteract these dangers it is necessary that the directors of public poor-relief and the different representatives of private charity should associate with one another for the purpose of devising a systematic and mutually complementary relief. Information about the indigent, as it is sought in the “charity organization societies,” in the *offices centraux des œuvres de bienfaisance*, in the *Vereinen gegen Verarmung*, and in the information bureaus, directs the indigent to the place where he can best find help, and leads to the discovery of those persons who misuse poor-relief and charity. Information about charitable institutions, as given in the digests and directories of great cities, show what measures are available, and how they can properly be made use of.

Beyond this activity, exercised almost exclusively by private parties, the need, at any rate, makes itself felt for a definite determination of the proper management and application of the means of poor-relief and charity. And here very different possibilities are open. The whole public poor-relief may be placed under one central board of control which is authorized permanently to supervise all the institutions and establishments that stand under it, to vote the estimates, to censure abuses, and to compel their redress by the authority



of the law. The most stringent form of supervision is exercised by the Local Government Board in England, with the assistance of general inspectors, local inspectors, and auditors. All boards of poor-relief are required to furnish regular returns, which render possible general poverty statistics at once of scientific and practical utility. In France, so far as one can speak of a public system of poor-relief — that is, as far as care for children, aliens, and the diseased is concerned — the supervision lies with a special department of the minister of the interior — the *directeur de l'assistance publique*. He has, as an advisory board, the *conseil supérieur de l'assistance publique*, which undertakes an exhaustive examination of all questions relating to poverty and charity, and expresses its judgment upon them. In Belgium a proposed law provides for a similar institution. In Italy, in accordance with a law which went into force a few weeks ago, a central government board, the *consiglio superiore di assistenza e beneficenza pubblica*, and besides for each separate province a provincial board of commissioners, *commissione di assistenza e di beneficenza pubblica*, are created. The latter is authorized to exercise direct supervision over the local boards of management, and to interfere in their action; while the intention is that the functions of the central board should be more of an advisory nature. In the new laws of certain Swiss cantons and of the Austrian crown lands the institution of inspectors of poverty has been recently introduced. In Germany there is no such central authority in charge of poverty. The supervision of poverty here forms a part of the general government supervision whose duty it is to guard against all pernicious measures, whatsoever they may be.

In the United States, of late years, public opinion has taken a very lively interest in this question, from the point of view as to whether such supervision is desirable and permissible. One must place over against this the institutions of the Old World, where the old absolutism exercised a strong influence on self-government, from which in modern times it seeks to free itself. The exact opposite is the case in the United States, where from first to last constitution and government are based on democratic principles. The result is that an encroachment here on the part of central government authorities would be viewed beforehand, from the standpoint of political freedom, with much greater distrust. At the same time, it is universally agreed that the government authorities have the right to remedy public evils and abuses from the standpoint of state protection, and to exercise supervision over state institutions proper. The problem becomes more difficult when the question is raised concerning the supervision of the remaining public institutions, and those which receive aid from public funds; and still more difficult



when purely private charity comes to be considered. The question has been answered in the United States, both theoretically and practically, in very different ways. First of all, a "State Board of Charities" was founded in Massachusetts in 1863. New York and Ohio followed in 1867. They bear very different names. Thus the above-mentioned State Board of Charities is in Washington and Wisconsin designated as the "State Board of Control;" in Iowa, "Board of Control of State Institutions;" in Maryland, "Board of State Aid and Charities;" and so on. Already in the names which they bear the essential difference makes itself felt, for which the Ohio and Iowa systems form the respective types. In the one case it assumes the form of a control, accompanied by the power of compelling, by government authority, the adoption of measures of improvement. In the other case there is simply a supervision, with the authority of exercising advisory powers solely. In some states the authority is intrusted to several boards. Thus there exists in Massachusetts a State Board of Charities; in Maryland and New York, besides this, a special Commission in Lunacy. In regard to the question of the supervision of private charities, the fact must be taken into consideration that here voluntary contributions are in question, and that as a rule every one must be allowed to spend his means in his own way. Yet it is only right to remember that, just as the state interferes in the management of insurance, banking, and manufacturing, from the standpoint of the welfare of society, so also the welfare of society is concerned with certain spheres of private charity. This is especially the case in the care of children and the housing of sick, old, and helpless people in institutions. The movement toward such a conception of the matter, however, has received a severe check through the decision of the supreme court of New York, which denied that the State Board of Charities in New York had the right of supervising the measures of the Society for the Prevention of Cruelty to Children. As an actual fact, in consequence of this decision, more than half of the charitable societies have been withdrawn from the supervision of the board.

In the countries of the Old World this question receives very different answers. While in Germany again the supervision of private charity is only a part of state supervision in general, in England charitable endowments in particular are assigned to charity commissioners, whose influence, however, is rather limited. In France the very vigorous fight over this question keeps pace with the fight over the bounds between church and state. In Italy, on the contrary, the powers of supervision of the state authorities have been greatly widened by the law of 1890, and by the institution of the new central boards of control already mentioned. All these measures point to where the highest importance lies. This is not simply

in a supervision which shall secure the remedy of whatever abuses exist, and the inauguration of a well-organized administration; but in furnishing the instrument of this administration with the most successful modes of management; in studying and making known new methods, especially in the sphere of insanity and of disease, as well as of the protection of children; and in general in elevating poor-relief and charity to a higher stage. And as the bounds between public relief and private charity have never been completely defined, there enters, side by side with the activity of the government, a very active private propaganda waged by the great charitable societies, and also by societies confined to the several departments of charitable effort. Here belong the English Poor Law Conferences, an annual assembly of those who administer public relief, to take council on all questions to which poor-relief gives rise; and also the *Congrès national d'assistance publique et de bienfaisance privée* in France, and the *Congresso di beneficenza* in Italy. In Germany it is the German Association for Poor-Relief and Charity which, during its twenty-five years of existence, has, in the most thorough manner, discussed all questions that appertain here, and has exercised an extraordinary influence on state legislation, on the control of poor-relief in the cities, and on the development of private charity. In the United States, the National Conference of Charities and Correction and the State Conferences possess an equal importance. Very real service is also rendered by the Charity Organization Societies and the State Charities Aid Association. International congresses for poor-relief and charity have been repeatedly held, for the most part in connection with the world's expositions, such as in 1856 in Brussels, in 1857 in Frankfort on the Main, in 1862 in London, in 1889 and 1900 in Paris, etc. At the international congress held in Paris in 1900 it was decided, through the appointment of a standing committee, that an international congress should be convoked at intervals of five years. The next will take place in Milan in 1905.

In this connection there is still one point that deserves attention. The distinction between public and private poor-relief rests on the fact that the one is regulated by law, and the expense, coming out of the means of the rate-payer, may be contested; while private relief is voluntary, and is administered out of voluntary contributions. Nevertheless, the difference between public and voluntary relief is not so prominent in practical administration as theoretical considerations would lead one to think. Moreover, in countries of which voluntary poor-relief is characteristic, the civic authorities place very considerable public means at the disposal of those who manage this voluntary relief; while, on the other hand, in the poorer communities of Germany or England the public relief falls far short of the demands made upon it. Moreover, the prevalence of voluntary

relief does not exclude the state or the community from appropriating means for single objects. Thus in France the care for children and the insane devolves upon the *départements*, and the care for the sick, on the local communities, to which, however, the state grants considerable assistance. On the whole, the participation of the state and its greater associations in the burden of poor-relief forms a prominent feature of the modern development of public relief. The whole body of modern legislation on poor-relief in Germany, Switzerland, and Austria provides for considerable state and provincial aid for poor-relief, and lays on the state or the province direct responsibility for the care of certain classes of poor, for example, especially the insane, the infirm, and idiots. Moreover, a marked tendency to introduce, or at least to extend the sphere of public relief makes itself evident in the Latin countries, as in the French law of 1895 concerning the care of the sick, in the Italian law of 1890 on public charity, and in the proposed legislation in Belgium and the Netherlands which has not yet been discarded.

These efforts to increase the sphere of public relief are at first surprising, and appear to stand in contradiction to the distinctive characteristics of the age in which we live — to counteract poverty rather by methods of prevention and by measures calculated to increase prosperity in general. Yet here there is no contradiction, but, on the contrary, a proof of the fact that poor-relief on its side has imbued itself with a knowledge of the importance of all such measures of prevention, and is directing its efforts to become what we to-day are accustomed to call "social relief." The legislation on the education of abandoned children, the oldest of which dates back scarcely twenty years, rests on the principle of this knowledge. It administers poor-relief to the children with the aim of preventing the young who grow up under the direction of this law from falling in future years into a condition of poverty. A like tendency is displayed by the societies for the prevention of cruelty to children, the juvenile courts, the promotion of immigration to Canada, the equipment of school-ships, etc. The care for disease has a far wider aim than the mere care of the patient. It searches out the lurking-places of disease in order to tear it out by the roots. It is no wonder that new problems have everywhere sprung up, where the light of new sanitary and social knowledge has lit up the corners and holes of poverty, and where the young science of sociology has taught us to understand economic and social phenomena. One need here only call to mind the very recent movement for attacking tuberculosis and the abuse of alcohol. At the same time, this movement against tuberculosis beyond all others makes very manifest how far we are still removed from a healthy condition of affairs, and how to-day, in spite of every effort, millions of our fellow beings still live in such

unfavorable conditions in respect to lodging, food, and education, that they fall victims in frightful numbers to this disease. No one who knows the circumstances can help seeing that all these measures, such as dispensaries, sanatoriums for consumptives, and administration of poor-relief, have no importance in comparison with the possession of permanent and remunerative employment, which renders possible the procuring of sanitary dwellings and sufficient nourishment, and strengthens the power of resistance against that frightful disease. But just this knowledge points us the way, not indeed of solving the problem of poverty, but of bringing ourselves in some degree nearer its solution, in that we see in this knowledge, which has grown up out of the social subsoil of our time, the most important sign of progress, and in that we place the furthering of general prosperity and the elevation of the working classes before even the very best measures of poor-relief and charity.

And here we must not be led astray by the fact that to-day these measures still demand an immense expenditure of public and private means, and that in the immediate future the question will be rather of an increase than of a diminution of this expenditure. And so far as we strive to enlighten the public mind in this sphere, and to effect improvement, we must always bear in mind that poor-relief and charity must always be content with the most humble position among those measures which are directed against poverty. He who helps the needy to help himself does better than he who supports the poor. The most earnest effort of every true friend of the poor must always be directed toward making poor-relief itself superfluous.

## SHORT PAPERS

MR. FREDERIC ALMY, of Buffalo, New York, presented an interesting paper to this Section relating the story of the foundation and development of the George Junior Republic at Freeville, New York.

MR. HOMER FOLKS, ex-Commissioner of Public Charities of New York City, presented a paper on "Distinctive Features of American Child-Saving Work."



## SECTION F—THE CRIMINAL GROUP



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(Hall 5, September 23, 3 p. m.)

SPEAKER: MR. FREDERICK H. WINES, Secretary of State Charities Aid Association, Upper Montclair, New Jersey.

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### THE NEW CRIMINOLOGY

BY FREDERICK HOWARD WINES

[**Frederick Howard Wines**, b. Philadelphia, Pennsylvania, April 9, 1838. A.B. Washington College, 1857; Princeton Theological Seminary, 1865; I.L.D. University of Wisconsin. Hospital Chaplain, United States Army, 1862-64; Pastor, Springfield, Illinois, 1865-69; Secretary, State Board of Public Charities of Illinois, 1869-93, 1897-99; Assistant Director, Twelfth United States Census, 1899-1902; Secretary, New Jersey State Charities Association, 1903-04. Member of National Geographic Society; Royal Statistical Society; Société des Prisons (France); National Prison Association (President, 1904). **Author** of thirteen volumes of biennial reports of the Illinois State Board of Charities; *The Liquor Problem in its Legislative Aspects* (joint author); *Punishment and Reformation*; special decennial reports on crime, misfortune, and benevolence for the United States Census of 1880 and of 1890; and of numerous articles on charities and corrections.]

WITH the voyage of Columbus in 1492 the world awakened to self-consciousness. By that event the intellectual horizon of mankind was enlarged, and the birth of modern science and civilization foreshadowed and assured. Of the many changes in habits of thought and life that may be traced to this original source, not the least noteworthy is the altered attitude of society and of governments in general toward crime and criminals. Does the history of prison reform for the past four hundred years enable us to predict with any approach to certainty what its future is likely to be? I think so; because the prison, in common with other social institutions, has gathered into itself and reflects all the experience and tendencies of contemporary social evolution. All men of average intelligence and information know what have been the main lines of progress. The darkness of superstition has fled before the dawn of science, the arts have been developed, the art of printing and improved methods of transportation and communication have placed the experience of every nation at the service of all mankind, wealth has multiplied indefinitely, and civil and religious freedom have become the almost universal heritage of Christendom. Best of all, the material advance of the race has been accompanied by a moral and humanitarian uplift not less wonderful and even more beneficent. Since no revolution ever goes backward, we have no reason to anticipate any permanent

reaction in a movement which includes in its sweep the entire globe, with its diversified interests of every sort.

It is in the record of social evolution in the United States in the West, and in Japan in the East, that this movement can best be studied, for there it has been most recent, most rapid, and most conspicuously consistent. Let us confine our attention, however, to the United States.

It would be an exaggeration of the truth to say that all of the most fruitful reforms in criminal jurisprudence and in prison discipline have originated in America, and yet the practical genius of this nation, unfettered by precedent and tradition, has enabled it to adopt and realize conceptions formulated by leaders of thought in the Old World, but which were regarded by their compatriots and contemporaries as visionary, until we demonstrated their utility and value. Prison architecture may afford an illustration. The plan of the prison of Ghent was stellar, that is to say, it was constructed with wings radiating from a common centre; but it was not until an American architect, who appropriated this fecund Flemish suggestion, had devised the Eastern Penitentiary of Pennsylvania, in the city of Philadelphia, which is still occupied as a state prison, that official and unofficial visitors from Europe discovered its merits and imitated it — at Millbank in London, and elsewhere. The arrangement of cells next the outer walls, on both sides of a central corridor, at Cherry Hill, was identical with that in the Hospital San Michele, founded at Rome in 1704 by Clement XI, of which John Howard has left us a description, illustrated by drawings. In the prison of Ghent, however, the wing set apart for the detention of criminals contained a tier or tiers of cells placed back to back, opening into corridors next the outer walls (another idea borrowed from the prison of Ghent), which was the method of construction followed in the erection of the New York state prison at Auburn, the standard architectural type of the distinctively American prison.

If we turn to the criminal codes of the world, it was William Penn, the Quaker, who, in giving laws to the commonwealth which bears his name, erased, by a single stroke of his quill, all those bloody provisions of English law which prescribed the penalty of death for some two hundred listed offenses, and who limited capital punishment to a single crime, that of willful murder. The theory of the indeterminate sentence and conditional liberation, now incorporated in so many American codes, had been advocated as a theory of legal punishment by various distinguished Europeans — Archbishop Whateley, the brothers Hill (Frederick and Matthew Davenport), Bonneville de Marsangy, of France, and others. Captain Maconochie, of the Royal Navy of Great Britain, had experimented with it in Australia, at Norfolk Island, combining it with the graded system;

and Sir Walter Crofton, director of Irish convict prisons, had made it the cornerstone of his remarkably original and successful administration of the trust committed to his hands. But it was not until it had crossed the sea and been applied in practice at Elmira, in the State of New York, that it became the theme of a special literature, of vast extent, in all languages, and began powerfully to influence the governmental action of Continental Europe.

As to probation and the juvenile court, they are both American innovations in criminal jurisprudence and practice, for which we are indebted respectively to the state of Massachusetts and the city of Chicago.

I beg you to believe that these observations are not prompted by national vanity, which is a pseudo-patriotic sentiment, but by regard for the truth of history and in the hope of giving greater definiteness and stronger emphasis to what is to follow.

In the development of prison reform this country has enjoyed the advantage, in the first place, of being a new country. It imported its institutions and its laws from the Old World, but it was not wedded to them. These laws and these institutions had a tinge or cast due to their having originated under purely monarchical forms of government, while democratic ideals were here all but universally prevalent. The alteration in our laws and the change of form in our institutions took on a general direction which may be traced to this political impulse as its source. The one conspicuous exception is the county jail, the worst and most discreditable feature of the American prison system. English, not Roman law was the foundation upon which we builded; and we transplanted to our own shores the English shire, which was and still is, everywhere but in the New England States, the political unit; and even in New England the distribution of courts and their adjuncts, the houses of detention for prisoners awaiting trial, conforms to the politico-geographical organization of the state by counties. The population of the original colonies was sparse and widely scattered; there were few towns of any considerable size; roads were bad and travel difficult, locomotion by steam power not having yet been invented; and there was very little crime, and only an occasional criminal. The early jails were very primitive in design, being for the most part nothing more than log huts with a single room (rarely two), into which the suspected and the convicted were thrust, pending the disposition of their cases and while undergoing sentence. This mode of incarceration has survived the original necessity for its adoption, partly because of the large investment of capital which has been made by the public in county prisons, and partly for political and other reasons. The county jail is acknowledged to be, in this country and at the present time, an anachronism; but many years may elapse before we are ready, as a people, to abandon it. It cannot permanently endure.



There were, too, it must be remembered, in colonial times, no state prisons. The settlement of America, in the seventeenth century, antedated the European movement for penal law reform. From the middle of the sixteenth century, it is true, workhouses and houses of correction had begun to spring up, here and there, in England and on the Continent, but the modern penitentiary dates from the war of the American Revolution, when a forcible stop was put to the English practice of shipping felons to this country and disposing of them by sale to the highest bidder. The prisons inspected and described by John Howard were county and local prisons. Before the Revolution there were no penitentiaries, even in England.

We had a virgin field in which to experiment, and we have experimented to some purpose. In other countries, the state or central prisons are the property of the nation. In the United States, on the contrary, in consequence of the partition of political sovereignty between the states and the nation, under which the punishment of crime is almost wholly relegated to the states, there have been, until within a few years past, with the exception of naval and military prisons, no prisons established and maintained by the Federal Government. We have, accordingly, as many distinct criminal codes as there are states and territories in the Union, with even a greater number of central prisons. Our opportunities for experimentation and for the comparative study of results would, therefore, have been unequaled in the history of the world, were it not for the lack of uniform and adequate criminal statistics, so desirable for scientific and other reasons, which the federal authorities do not yet feel it incumbent upon them to collect and publish.

From this hasty and superficial sketch it clearly appears, I think, that, while the prison reform movement in America has been in one of its aspects, a phase of a larger movement, in which all civilized nations have had a share, some of its features have been more or less local and peculiar. It has been accelerated and intensified by the unprecedented growth of the New World, its originality and independence, its intellectual activity and fertility of invention; and the peculiar bent of our national life has impressed itself upon the prison, as upon all other distinctively American institutions.

Let us cast a preliminary glance at the general trend of progress throughout the world. There was a period, in the remote past, when there was not a criminal code in existence, none having been yet formulated. The establishment of the first code in which punishable offenses were defined and listed was a tremendous step in the direction of criminal justice and of civil liberty, since it was a limitation upon the cruel caprice of tyrants; though it may well be questioned whether it has ever or anywhere constituted in practice a complete check to their anger and oppression. The earlier codes were short

and simple. They all proceeded upon the principle subsequently promulgated by the French Revolutionary Assembly, in 1791: "Penalties should be proportioned to the crimes for which they are inflicted." They prescribed definite and invariable penalties for specific offenses. The history of codes, following the general course of their successive evolution, is characterized by a gradual increase in the number of punishable offenses, and a tendency to diminution in the number of distinct varieties of legal punishment, culminating in the substitution, for most of them, of some form and duration of simple imprisonment. Imprisonment is, in the United States, practically the only penalty commonly inflicted. We retain the death penalty, it is true, but it tends to fall into disuse. We authorize the imposition of fines, but they may be commuted into terms of imprisonment at the pleasure of the convict. There is but one state — and that the least of all the states — in which the pillory and the whipping-post may still be found. But imprisonment as a penalty for crime is a historical novelty.<sup>1</sup> When it was recognized in France, little more than a century ago, the code itself prescribed definite terms of imprisonment. Twenty years later the French courts were authorized to determine the duration of individual sentences within certain maximum and minimum limits. The experience of France in this regard is typical of universal experience, and the growing tendency in this direction might be illustrated, did time permit, by references to the history of American legislation. The amendments made to all codes, both penal and judicial, are the result of dissatisfaction with their practical operation. They are a confession that the equitable apportionment of penalty to crime is not the easy problem of solution that the Revolutionary Assembly imagined it to be.

Through this entire process of change the subdominant note has been the gradual amelioration of penalty, or the softening of manners with the lapse of time.<sup>2</sup> If any one lesson has been driven home to the political consciousness of legislators and of judges, it is that brutal and needless severity in dealing with crime defeats the ends of justice and promotes the unnatural growth of crime.

Side by side with the tendency thus described may be noted another, namely, the diversion of attention, in an increasing ratio, from crime as an abstraction to the criminal as its concrete embodiment, from the act to the actor,<sup>3</sup> and this has been accompanied by the

<sup>1</sup> "Our criminal procedure appears, in many instances, to point only at the destruction of the accused" — Beccaria (1764).

<sup>2</sup> Even in China the number of blows which may lawfully be inflicted upon an offender has been reduced from one hundred to forty.

<sup>3</sup> "All responsible action is primarily postulated along the line of free will functioned upon the moral intuitions. Where freedom ceases, automatism begins. Beyond that point conduct may be a menace, but it can never be a crime; *it may be an event, but in no sense an act.*" — Drahms.

conviction that if the perpetrator of a criminal act is an object of blame, he is also an object of pity, and that, if his crime merits reprobation, he himself may nevertheless be capable of reformation. This is not a new idea. The inefficacy of punishment has in all ages impressed the consciousness of those by whom it has been inflicted. Pope Clement XI declared it to be absolutely inefficacious, unless accompanied, in its administration, by a reformatory régime. The moral motive of the penitentiary system in the minds of philanthropists and statesmen like Howard, Blackstone, and Bentham was the hope of saving men. The very word "penitentiary" means a place for repentance and amendment. What is noteworthy is the rapid rate at which of late this conviction, this sense of moral obligation has gained ground in the world and modified penal law and its enforcement.

In this country prison reform began, as has been said, with the establishment of state prisons, organized and governed on rival methods, known as the Pennsylvania and Auburn systems. The former, also called the solitary system,<sup>1</sup> provided for the isolation of all prisoners both by day and by night; the latter for their isolation by night only. By day they were employed, at Auburn, in association in large prison workshops; but to prevent mutual contamination, all conversation between them was strictly prohibited. The well-meant purpose of each of these systems was the same. Their authors and advocates argued that crime is contagious, and that the remedy is quarantine. The result hoped for by them was reformation; and the road to reformation was believed to be by the way of discipline. At Philadelphia the prisoner was left to his own reflections; interrupted by occasional brief visits from volunteer prison visitors. At Auburn he was flogged for talking contrary to the rules. Odd impressions of the criminal were then generally current. Captain Elam Lynds, the warden in charge at Auburn, held that no large prison can be governed without the aid of the lash. The directors of the Massachusetts state prison exhorted all its employees to think of it as "a volcano filled with burning lava," and laid down the rule that the discipline "must be as severe as the law of humanity would tolerate, in order to conquer the mind of the convict and reduce it to a state of humiliation." In Connecticut prisoners slept at night with their feet fast to iron bars and their bodies attached by chains around the neck to a great wooden beam. On the occasion of the first religious service held in the Walnut Street Jail, in Philadelphia, the jailer, by way of precaution against riot, and to insure the personal safety of the officiating clergyman, had a cannon placed in the yard, and stationed a guard beside it, holding in his hand a lighted match.

<sup>1</sup> But more lately, first the "separate" and then the "individual" system.

Between the partisans of these rival systems a furious controversy broke out, the echoes of which may still be heard reverberating around the globe, for it has not yet completely died away. The Philadelphia Society for Alleviating the Miseries of Public Prisons defended the separate system, which was acrimoniously assailed by the members of the Boston Prison Society and of the New York Prison Association. The protracted discussion which ensued had the merit of bringing to light the inherent defects and essential cruelty of both systems; but victory rested with the opponents of the Pennsylvania plan, which was tried by three or four states, but soon abandoned. It nominally survives at Philadelphia, but not in fact, since that prison, with eight hundred cells, now contains over twelve hundred sentenced convicts. The Auburn system, with its rule of perpetual silence, impossible to enforce, has also died a natural death. Then, as now, prisons were of two sorts: one local and minor, in which there was no discipline; the other central or state, in which there was far too much. The *juste milieu* had not yet been discovered.

Without regard to the theoretical arguments for and against the separate or individual system, it may be said, in passing, that its abandonment is primarily attributable to financial and practical considerations. It is more costly to install. The ordinary American prison cell contains not more than five hundred cubic feet of space, while the separate cell requires the provision of at least one thousand feet, or double the quantity. It is, therefore, more difficult, in a country with a population multiplying so rapidly as does that of the United States, to secure adequate accommodation for prisoners on the separate than on the congregate system. Moreover, the earnings of the prison are less, since they depend on the employment of labor-saving machinery driven by the power of steam, which can be used in the shops of a congregate prison, but is not adapted to use in prisons of the opposite type.

All progress has its root in the sense of failure to realize an ideal. There are as many distinct ideals as there are groups of men. The economic ideal of the prison is that it shall be self-supporting; the administrative ideal, that it shall be secure and orderly; the political ideal, that it shall minister to the reputation and the stability of the party in power; the punitive ideal, that it shall crush its helpless inmates and strike terror into the hearts of men tempted to enter upon a criminal career; the sentimental ideal, that it shall be the abode of comfort and content; the philosophic ideal that it shall be so conducted as to reform as many of those committed to it as are susceptible of reformation and rehabilitation. These ideals spring up partly from within and partly from without. Prison officials have the opportunity to study the criminal at first hand by close and continued contact with him. They become familiar with his peculiar-



ities, his tastes, his notions, his sentiments, his habits. They note the effect upon him of every detail of the discipline to which he is subjected, and the changes in their attitude to him correspond to the keener insight and more accurate judgment gained by a large and long experience in prison administration. The outside world has a different standard of comparison. It judges by results as shown on the ledgers of the state, the dockets of the criminal courts, and elsewhere. It asks itself, Does the prison accomplish what the people expect and demand of it? Does punishment really punish? Does intimidation intimidate? Does reformation reform? Is there any appreciable diminution in the volume of crime in the community?

In the development of popular ideals and continually higher standards of excellence, prison societies and prison congresses play the leading part. The medieval prison societies were relief-giving societies, in an age when prisoners, if they did not supply their own food, got none; when imprisonment for debt was common, and poor debtors would have starved but for the generosity of the public. The modern prison society formulates theories of prison discipline, promulgates them, and endeavors to find employment for discharged convicts. In the prison congress the official and non-official elements, the expert and amateur, meet and exchange views, to their mutual advantage; and thus, step by step, slowly but surely, the cause of prison reform advances with the onward march of intelligence. Science ministers to it, and so does religion. Science endows it with its own rich gains in the knowledge of nature and of human nature and in the applications of science to the mechanic arts. Religion contributes the altruistic motive and the sentiment of moral obligation and of hope, giving to the reformer strength to persevere in the face of repeated and persistent discouragement. It supplies, in the prison, a specific element of personal touch, without which all routine treatment is powerless for good.

Nevertheless, or perhaps as a necessary consequence of this minute, critical study of results, the belief gains ground that the penitentiary system, like all the abandoned devices for the suppression of crime, will ultimately prove a disappointment. It accomplishes none of its avowed aims. As punishment, term imprisonment is inequitable and unjust. As a deterrent, its influence is inappreciable. As a reformatory agent, conducted as most prisons have been and still are, it is on the whole a failure. The minor prisons, in which men and women are incarcerated for short periods in association, unemployed, are pestilential centres of moral infection. The central prisons benefit a certain percentage of their inmates by the change of environment, the regular hours, the enforced abstinence, the industrial occupation, and the very partial educational and religious influence which incarceration in them implies. But the life led in



them is unnatural from every point of view, enfeebling and demoralizing. The volume of crime in the community does not diminish; there are even those who claim (but on inadequate evidence) that it is increasing.

Accordingly, the history of prison reform may almost be written in terms of progressive disuse of the prison, either for punitive or reformatory ends. The supreme folly of the harshness of the earlier discipline practiced by novices in the art of governing criminals soon became apparent. The second generation of wardens learned that the criminal is not a beast, but a man, who rebels against oppression, but responds to kind treatment and encouragement, with whom more can be done by privileges granted as a reward for good conduct than by disciplinary punishment.

The original germ of the prison system of the future was the passage, by state after state, of "good time" laws, which authorized a deduction from the term of imprisonment prescribed by the court, proportionate to its length, as the highest reward for obedience to prison rules. This was disuse, a reduction in the total number of the imprisoned; and (which merits especial notice) it was the negation of the principle that a sentence once formally pronounced by a court must be executed in accordance with its original and literal form. Either the original sentence was delivered, subject to modification in accordance with the new legislation, or else the legislature claimed and exercised the power to modify it, subsequent to its delivery. The foundation was thus laid for a complete subversal of the historical basis of all existing criminal codes.

The second step in the progressive disuse of the prison was the inclusion in some of these codes of the principle of conditional liberation, and the third was the adoption in others of the principle of suspended sentence or probation. Conditional liberation empties the prison at one end, and probation at the other.

We have now a third generation of wardens, trained under the later legislation, who are far in advance of their predecessors in point both of average intelligence and of average humanity, and the moral tone of the institutions under their charge has been correspondingly elevated and improved.

The trend of progress in this general direction was greatly aided by the influx of a stream of European influence, to which reference must now be made. Captain Alexander Macdonochie, R. N., Governor of Norfolk Island, in Australia, was the inventor of the mark system. He attached to the marks bestowed by him a pecuniary value, and made the date of liberation of convicts depend upon the number of marks earned by them. After his recall to England he was appointed governor of the Birmingham Gaol, where he experimented further with it. Sir Walter Crofton, the Director of Irish Convict

Prisons, borrowed it from Maconochie, adding to it a system of grades. Marks and grades thus passed into English criminal law, and were accepted by some other nations, notably by Denmark and Hungary. Recorder Hill, of Birmingham, was the connecting link through which the knowledge of the Irish system was communicated to the American mind. Its philosophic soundness and practical utility were at once recognized, and an effort was made to apply it to American conditions. Progressive or conditional liberation was the heart and core of that system; but it was not carried to its logical conclusion either by Maconochie or by Crofton, probably because of its novelty and the natural operation of the cautionary instinct. The opportunity to transplant it came, when the State of New York created, at Elmira, the first intermediate or reformatory prison, designed for young men supposed to have been convicted for the first time of a felonious offense. Mr. Z. R. Brockway, an experienced prison officer, with a daring, original, and open mind, and a passionate love of his work, a man in whom the scientific temperament largely predominated, who was well versed in the literature of penology, and who united in his complex and versatile nature the impulse to save men by uplifting them with the enthusiasm of a born educator,<sup>1</sup> was chosen to be its superintendent. This event marked an epoch, the turning-point in the history of prisons, not only in America, but, as I believe, in the civilized world. It was the birthday of the new criminology.

In the organization of the Elmira Reformatory, to the marks and grades of the Irish system there was added the indeterminate sentence. Strictly speaking, an indeterminate sentence would be one without either a maximum or minimum limit. Offenders were formerly consigned to prisons like the Tower or the Bastile, to be held during the pleasure of the King. That was an arbitrary act. The contrary idea, in the minds of the advocates of the indeterminate sentence, was that it should be (and some of them so called it) a "reformation" sentence, or a sentence to imprisonment until the convict should give satisfactory evidence of his reformation. It was felt to be impossible to induce the legislature to take so long a step in advance, and the New York Reformatory Act fixed an invariable maximum term of incarceration, usually five years (but in every case the maximum term authorized by the criminal code for the offense proved), leaving it to the discretion of the authorities in charge of the institution to release on parole at an earlier date such prisoners as they might deem it safe to set at large. At that time this was an absolute novelty in legislation. Juvenile delinquents, it is true, were in some states held to be wards of the state during the period of their minority, to whom the government stands *in loco parentis*, and, after

<sup>1</sup> Froebel declares that education is "deliverance."

a term of apprenticeship in a reform or industrial school, they might be, and often were, paroled. This method of disposing of them had yielded excellent results. But the postulate on which that law rested was that a child of tender years, because of his immaturity, is irresponsible for his acts, and, therefore, incapable of crime. No similar claim could be made on behalf of the fully grown men committed to Elmira. And yet there must have been intellectual preparation of some sort for so great an innovation in criminal law and practice. What was it?

The inequity of definite sentences had been demonstrated by experience to the satisfaction of all competent observers. Almost invariably the term of imprisonment named in the *mittimus* was either too long or too short. The sentence of the court, nevertheless, once pronounced, was immutable and irrevocable. The only alternative was an appeal to executive clemency. After the indeterminate sentence (so-called) had gone into effect in New York, in Massachusetts, and possibly one or two other states, a comparative study of all sentences for crime in force at the date of the Eleventh Census (1890) was made, in the scientific spirit, by authority of the Federal Government. The tabulated result, which is accessible in the official report published by the Census Office, reveals in a striking manner the lack of any principle of uniformity or of due proportion in the distribution of imprisonment for given offenses, as between the states, or even within the limits of any single state. The inference is inevitable that the theory of adjustment of penalty to guilt, measure guilt by what standard you will, is a myth, a figment of the imagination, unsubstantial as a disembodied spirit and infinitely more dangerous and harmful.

The inequity of judicial sentences for crime having been once established, the question arises, how to equalize them? What is the remedy for the evil complained of? Of the three coördinate branches of the government, two have attempted to establish and secure penal justice, namely, the legislature and the judiciary. Neither has succeeded. Obviously, the only remaining alternative is to impose this duty upon the executive department. Has not the governor of the state the power to grant pardons and commutations of sentences? Yes, but the grant is an act of arbitrary sovereign power. What is needed is something quite different, to wit, the establishment of a system under which the authorities who have the custody of the prisoner, and who, being appointed by the governor, are his representatives and agents, and are empowered to establish rules, subject to executive (or even joint executive and judicial) approval, governing the date and the conditions of the prisoner's release. These officials are members of the executive branch of the government. They are in a position to gain, by observation and

inquiry, a full knowledge of the life-history of the convict, and of his character and intentions, such as no court ever can. They are, or should be, experts in criminal chicanery, who cannot easily be deceived by hypocritical professions or by simulated and self-interested obedience to rules, who are capable of forming a tolerably accurate judgment as to his actual state, and of determining whether or not the treatment given him has produced a genuine change in his attitude to the law and to the commonwealth. If any analogy is needed, in order to justify the confidence reposed in them, it may be found in the grant of precisely similar powers to the medical superintendent of every American hospital for the insane.

Let us now go deeper, and probe this problem to the quick. Let us ascertain, if we can, the underlying cause of the failure of lawgivers and of judges to secure and establish criminal justice. Nothing could be simpler or more obvious. The aim of both was to establish a mathematical proportion between the guilt of every offense and its appropriate penalty, and so to adjust one to the other. In order to realize this design, a common measure of guilt and of pain is indispensable. But no such common measure exists. Justice is an abstraction, elusive as a sunbeam, imponderable as a shadow. A criminal court is a trap to catch sunbeams. Neither the legislature nor the court can make use of a non-existing pair of scales with imaginary weights. Yet this is the instrument which the legislature gravely presents to the court, with an unuttered prayer that an infinitely wise God may overrule all judicial blunders to his own glory and the good of mankind. Grasp this thought firmly, and thereupon the seemingly solid foundation of the current penal codes of Christendom melts into vapor and disappears like a dream when one awakens from sleep. Its unreality, its absurdity, at once become apparent to the aroused normal intellect.

If, then, the indeterminate sentence proposed nothing more than to transfer responsibility for the achievement of an impossible undertaking from the courts to the prison officials, its failure would be assured in advance of its adoption. That is precisely what it does not propose.

It has been said, but without sufficient information, that the researches and conclusions of the school of criminologists known as criminal anthropologists were the original occasion and motive of the introduction into American criminal jurisprudence of the principle of the indeterminate sentence. There is no historic proof of the truth of this assertion. Criminal anthropology, uncertain and vague as its formulated teachings are in their yet partially developed stage, has unquestionably rendered valuable service to science, especially to the sciences of physiology and psychology, and to law. It has devoted its energies to the study of the criminal. It regards him as



a being to be treated rather than to be punished, and holds that his treatment must be adapted to the individual, in the light of his actual condition and possibilities, and not determined by the criminal label with which he happens to be tagged. It has brought into strong relief the relations between abnormal physiological conditions reacting against a special environment and the crimes which such reaction suggests and induces. The psychological experiences of the criminal are in fact written, in characters more or less legible, more or less obscure, upon his physical frame; and their decipherment is a worthy task, a pursuit which may well absorb the attention of scientific investigators. The labors of the criminal anthropologists logically lead to the acceptance and adoption of the indeterminate sentence; but they were little known, and had made no serious impression in America at the date of the creation of the Elmira institution.

What was, in fact, the unsubstantial basis of the vanishing criminal code? It was retribution. It was the belief that crime is to be punished because it merits punishment; that the criminal must be made to suffer because he deserves to suffer; that guilt can be removed only by expiation. True it is that crime merits punishment, and that the criminal deserves to suffer. Does it follow that I, you, or we are under a moral obligation to inflict this punishment? True it is, that expiation is the antidote to guilt; but is not sorrow, the pain of penitence, more truly expiatory than physical agony? By what are men saved? By despair? Why may not the punishment of offenses be left to the slow but sure processes of natural or supernatural law? If it should be said that the reaction against crime, the horror and indignation that it awakens in the human mind, is an integral part of the process, that vengeance is a natural instinct, it is nevertheless a brutal instinct, the same that animates the murderer, and, therefore, to be held in check. The religious instinct is opposed to brutality, forbids retaliation, and enjoins the forgiveness of injuries. In any event it is needless to found imprisonment on the instinct of retaliation, since the reactionary ends of justice are met by the fact of imprisonment, and the treatment accorded to the perpetrator of an unlawful act will be more, not less, effective for good if its conscious aim is not punitive but restorative.

The criminal code must have a basis. If not retribution, what is it? Social self-defense. Whatever is essential for the protection of social order and security is lawful, whether it be the redemption of the offender, his incapacitation for evil, or his extermination. Whatever transcends this limit is unauthorized in ethics and contrary to public policy. We incapacitate the criminal by confining him in prison. If he can be reformed, this is his right and our duty. If he cannot be reformed, he has forfeited the right to his personal liberty, and



society has the right to prolong his disability for any indefinite period — for life, if necessary, or until he ceases to be a social peril. This conception of the function of the prison ignores the popular clamor for vengeance; it protects the criminal, while it protects the community; and it accords with the humanitarian tendencies of the present age. The world has shifted its point of view. The material conquests of advancing civilization have been paralleled by moral victories no less signal. The power of intellect, both in the material and the moral world, increasingly takes the place of the grosser, more violent and primitive methods of brute force.

It is strange that the disbelief in the possibility of amendment on the part of the criminal should be so deep-seated and universal. Men and women equally guilty before law, human and divine, but who have not been exposed to the contamination and shame of prison life, have abandoned their evil courses in response to influences exerted upon them in free life. There have been many signal instances of transformation of character and conduct occurring in prison. It would be foolish to estimate the exact percentage of corrigible and incorrigible convicts, or to shut our eyes to the persistence of the criminal type of character or to expect from the average prisoner anything more than that he shall cease to be a lawbreaker and become a law-abiding citizen. Religion encourages this hope. So does science, as I shall now proceed to show.

The methods and achievements of science have profoundly modified metaphysical thought, so that a new word, psycho-physics, has been admitted to the dictionary. In the psycho-physical study of human nature there is a constant recognition of the vital relation between mental experiences and the operations of the brain and of the nervous system in man, of their interdependence and reciprocal relations and influence. The researches of physiologists have shed light on much that was formerly obscure in the anatomical structure and functions of the body. We have learned that every mental impression and perception, every act of memory, of the imagination, of the judgment, of the will, every passing thought or emotion, is accompanied, in this life, the only life of which we have experimental knowledge, by molecular changes in nerve-tissue, by nervous activity and motion. The paths followed in the accumulation and discharge of nerve-force have been partially traced. By the aid of vivisection, scientific proof of their existence has been secured, and the functional utility of certain tracts of the brain has been demonstrated, enabling us to localize, to a limited extent, cerebral action, and to inspire the hope that the further prosecution to the investigations now in progress may dispel some portion, at least, of the mystery which enshrouds our present dual existence. The correspondences between the order of succession of nervous phenomena and of the phenomena of

thought, feeling, and volition, and the fact that certain of them are demonstrably simultaneous, have given definiteness and precision to metaphysical speculation with reference to purely mental operations, if such there are; and they have given us an intelligible theory of the formation of habits which, physiologically speaking, are neither more nor less than reflex nervous discharges rendered automatic by their repeated recurrence, until the paths worn in the brain have become, so to say, broad and smooth. The current of nervous energy accordingly takes the line of least resistance. This parallelism extends as far as consciousness enables us to follow it, and no doubt it is still deeper and more far-reaching. It partially explains, perhaps, the well-known and familiar fact that bodily states, experiences, and habits affect the mind, while mental states, experiences, and habits equally affect the body.

The truth of this general view is illustrated and confirmed by the success attending the efforts made by expert neurologists to develop the mentality of backward children by means of physical exercise and the systematic training of the senses, and, through them, of the nerve-centres. It is also illustrated by the success attending the converse efforts made by mental healers to stimulate or soothe nervous physical action by means of suggestion addressed to the mind. We are able to gain admission to the arcanum of life, as it were, by either of two doors, the avenue of sensation or that of ideation. We can modify mental operations by securing and exercising control of the body. We can modify physiological action by controlling the mind. The only question is whether we possess the requisite knowledge and skill. The knowledge and skill demanded for success, in either direction, is expert knowledge and skill.

It will not answer, therefore, to contend that, because criminals in the care and custody of an unskilled warden, with untrained and incompetent subordinates, have not been reformed, the same individuals might not have been reformed if they had been subjected to expert treatment at the hands of an expert. Expert treatment is the ideal of the new criminology. The new criminology aims at nothing less than the suppression of evil habits and replacing them by their opposites; in other words, the wearing of paths in the brain which shall offer less resistance than the old, familiar paths; the creation of new habits of thought, speech, and action, with or without the consent of the convict himself. This is a task of tremendous difficulty. It is revolution by means of evolution. It is education, in the etymological sense of the word; the education of all the prisoner's faculties, physical, mental, and moral, on a well-considered, well-grounded plan, scientific and practical at the same time, but differentiated to meet the conditions and needs of each individual case. Kindness must be blended with severity, hope aroused as well

as fear, obedience insisted upon and enforced, and above all the good will and coöperation of the patient enlisted for his recovery. Difficult as the task may be, it is not impossible, but time is essential for its accomplishment. How long a time is uncertain and cannot ever be foretold in advance. Hence the necessity for an indeterminate sentence. No surer method can be devised by which to insure the desired coöperation on the part of the prisoner than to make the date of his liberation depend upon his own submission and exertions. The tendency of the indeterminate sentence is to change the atmosphere of the prison. The convict, when his opposition to a reformatory discipline has once been overcome, comes to regard it as the abode of hope, not of despair. Sooner or later he recognizes in the warden a friend, whose strongest wish is to lift him out of the degradation into which he has fallen. When he begins to perceive that it is himself who has made war upon society, and that society is not his enemy, as he had blindly imagined, his reformation is begun. When he learns the meaning and intention of law, and becomes reconciled to it, like a wild animal tamed, his reformation is achieved. Affirmatively, therefore, as well as negatively, the indeterminate sentence is shown to have a rational basis. The indeterminate sentence and a reformatory discipline presuppose each the other as its essential complement. The maintenance of any reformatory system of treatment which shall prove in the highest degree effective, without the aid of the indeterminate sentence, is impossible. The imposition of an indeterminate sentence to a prison in which skillful and curative treatment is not supplied is a judicial wrong.

Let no one think that these assertions are the language of a sentimentalist or a visionary. Their truth has been verified by experience. If the American reformatory prisons have not yet fully met the reasonable expectations of their authors and supporters, this is because the new codes under which they are operated have been faultily drawn, or because the courts are not all of them in sympathy with the new legislation, or because the right men have not been assigned to the charge of these prisons, or because sufficient time has not yet been allowed for the realization of the higher and true ideals set forth in this address. The positions taken, the views advanced, are essentially correct; and their general, if not their universal, acceptance may be safely predicted, so soon as they are comprehended by that portion of the community which at all concerns itself with the prison question.

To prevent misconception and misrepresentation it only remains to add that, while the new criminology regards the antiquated and obsolescent discipline of the prison of the past as worthy of reprobation on account of its excessive hardness and severity, it does not deny the necessity for the employment of force in the repression of

crime, nor does it propose to coax criminals to amend their ways by resorting to the use of flowers, confectionery, and attar of roses. The government is bound to maintain order and to protect life and property. The menace implied in all law-breaking must be met with stern determination to compel obedience to law. The incorrigible recalcitrant must be eliminated; he must be shorn of his power to injure his fellows. What the new criminology stands for is, in the first instance, discrimination between wrongdoers, and patient tolerance, under surveillance, of such as do not manifest marked or habitual criminal tendencies, and of whose amendment without incarceration there is reasonable hope. This would be secured by the more general use of probation of youthful first offenders. It then demands that those who cannot be restrained by purely moral influence exerted outside of prison walls shall be committed for treatment under the indeterminate sentence, not in the spirit of retaliation and revenge, but in order that they may be subjected to an appropriate reformatory discipline, in their own interest and in that of society. It by no means holds that such discipline, however skillfully devised and applied, is a panacea for crime. It entertains no unsound, sentimental notions of criminal character, conduct, and accountability. It cherishes no illusive expectation that the methods employed will accomplish the impossible; that all prisoners will yield to them, or that the change actually effected in any individual will transcend certain fairly well-defined limits. But it insists that the convict is entitled to his chance, a chance which possibly he never before had, and that it is the duty of the government to resort to all practicable means for his restoration and rehabilitation. A reformatory discipline is not a weak and vacillating but an heroic discipline. Of all forms of discipline, it is precisely that which the criminal by choice and not by chance most hates and dreads. The change of habits which it seeks to bring about can only be effected by a judicious mixture of persuasion and compulsion, in which compulsion often must be the chief ingredient. It is bitter to the palate, but it is medicine.

When persuasion and compulsion both fail, when it becomes apparent that the perversity of the criminal is ineradicable by education, instruction, or an appeal to his religious beliefs, hopes, and fears, that the law has no terror for him, that he is in love with evil, and that he proposes to return, when released, to his former criminal courses, then, for social protection, but not as a penalty for crime, the new criminology recommends his permanent detention in custody, or for so long at least as he is and continues to be a social peril.

Strangely enough, it is this feature of the indeterminate sentence which excites prejudice and hostility; which renders judges, steeped in the traditions of a retaliatory penal code, averse to pronouncing it,

and legislators unwilling to authorize it. Some justification there is for their mental attitude. It is found in the dearth of capable men competent to administer the reformatory discipline to which the indeterminate sentence is an adjunct, and in the probability that, under the spoils system in American politics, they would not, if found, be appointed. But we shall by degrees outgrow this phase of our political history. The creation of an ideal standard of qualification for headship of a reformatory prison will develop the class of officials required to meet this new demand, and, with the more general dissemination and acceptance of correct notions of social organization and social duty, public opinion and sentiment will be ripe for the reform which we advocate. We have not entered upon the full possession of our inheritance, but we bequeath it with confidence to posterity.



## WORKS OF REFERENCE FOR THE DEPARTMENT OF SOCIAL SCIENCE

*(Prepared by the courtesy of Mr. Walter L. Sheldon, St. Louis, Mo.)*

- ADDAMS, JANE, *Philanthropy and Social Progress*.  
BLISS, *Encyclopedia of Social Reforms*.  
BROOKS, JOHN G., *Social Unrest*.  
BUCKLE, HENRY T., *History of Civilization*, 3 vols.  
COMTE, AUGUSTE, *Cours de Philosophie Positive*, vols. IV-VI. (Translated by Harriet Martineau under the title of *The Positive Philosophy of Auguste Comte*.)  
CONRAD, *Handwörterbuch der Staatswissenschaften*.  
DUPRAT, G. L., *La Morale: Étude Psycho-sociologique*.  
FAIRBANKS, ARTHUR, *Introduction to Sociology*.  
FOUILLÉE, A., *La Science Sociale Contemporaine*.  
GIDDINGS, F. H., *Principles of Sociology*.  
HUXLEY, T. H., *Evolution and Ethics and other Essays*.  
JHERING, R. VON, *Der Zweck im Recht*, 2 vols.  
KIDD, BENJAMIN, *Social Evolution*.  
LECKY, WILLIAM E. H., *Democracy and Liberty*.  
LEPLAY, E. F., *La Constitution l'Essentielle de l'Humanité*.  
LETOURNEAU, *La Sociologie*.  
LILIENTFELD, PAUL DE, *La Pathologie Sociale*.  
MACKENZIE, J. S., *An Introduction to Social Philosophy*, 2d ed.  
ROBERTY, E. DE, *L'Éthique*; I, *Le Bien et le Mal*; II, *Le Psychisme Social*;  
III, *Les Fondements de l'Éthique*.  
RUSKIN, JOHN, *Munera Fulveris*.  
    *Unto This Last*.  
    *Time and Tide*.  
    *Crown of Wild Olive*.  
SCHAEFFLE, A., *Bau und Leben des Socialen Körpers*, 2d ed., 2 vols.  
SMALL, ALBION W., and G. E. VINCENT, *An Introduction to the Study of Sociology*.  
SPENCER, HERBERT, *Principles of Sociology*, 3 vols.  
STEPHEN, LESLIE, *Social Rights and Duties*, 2 vols.  
STUCKENBURG, J. H. W., *Sociology, the Science of Human Society*.  
WARD, LESTER F., *Dynamic Sociology*, 2 vols.  
WRIGHT, CARROLL D., *Outlines of Practical Sociology*.  
WUARIN, *Une Vue d'ensemble de la question sociale*.  
See also the important collection of volumes, *THE SOCIAL SCIENCE SERIES*, published by Swan Sonnenschein & Co.

The following works in *Ethics* have important bearings on the *Regulative Department of Sociology*.

- HOEFFDING, HARALD, *Ethik*, a translation from the Danish into German.  
PAULSEN, FRIEDRICH, *System der Ethik*.  
SPENCER, HERBERT, *Principles of Ethics*, 2 vols.  
STEPHEN, LESLIE, *The Science of Ethics*.  
WUNDT, WILHELM, *Ethik*.

The following novels deal with the social problem:

- BELLAMY, EDWARD, *Looking Backward*.  
 ELIOT, GEORGE, *Felix Holt*.  
 HOWELLS, W. D., *A Traveler from Altruria*.  
 KINGSLEY, CHARLES, *Alton Locke*.  
 MORRIS, WILLIAM, *News from Nowhere*.  
 ZOLA, ÉMILE, *Travail*.

The following list of periodicals has been furnished at the request of the Chairman through the Department of Sociology of the University of Chicago:

American Journal of Sociology, University of Chicago; Annales de l'Institut des Sciences Sociales, Brussels, Belgium; Annals of the American Academy of Political and Social Science, Philadelphia, Pa.; Archiv für Kaufmannische Socialpolitik, Hamburg, Germany; Archiv für Socialwissenschaft und Socialpolitik, Tübingen, Germany; Archiv für Sociale Gesetzgebung und Statistik, Berlin, Germany; Association catholique, *Revue des questions sociales et ouvrières*, Paris, France; Charities, Charity Organization Society, New York City; Critica Sociale, Milan, Italy; Columbia University Studies in History, Economics, and Public Law, New York City; Cultura Sociale, Rome, Italy; Humanité nouvelle, Paris, France; Johns Hopkins University Studies in Historical and Political Science, Baltimore, Md.; Iowa State University Studies in Sociology, Economics, Politics, and History, Iowa City, Iowa; Journal of Social Science, American Social Science Association, New York City; Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich, Leipzig, Germany; Justice, London, England; Monatsschrift für christliche Social Reform, Basél, Switzerland; Musée social, Annales, Musée social, Mémoires et Documents, Paris, France; Réforme Sociale, Paris, France; Revue des questions sociales et ouvrières, Paris, France; Revue du Christianisme social, Roubaix, France; Revue internationale de sociologie, Paris, France; Revue Philanthropique, Paris, France; Revue sociale catholique, Louvain, Belgium; Riforma Sociale, Turin, Italy; Revista Internazionale di scienze sociali e discipline ausiliarie, Rome, Italy; Rivista italiana de Sociologia, Rome, Italy; Schweizerische Blaetter für Wirtschafts- und Sozialpolitik, Bern, Switzerland; La Science sociale, suivant la méthode d'observation, Paris, France; Social Tidskrift, Stockholm, Sweden; Social Service, Institute for Social Service, New York City; Sociale Rundschau, herausg. vom K. arbeitsstatistischen Amte im Handelsministerium, Vienna, Austria; Zeitschrift für Socialwissenschaft, Breslau, Germany; Soziale Revue, Essen, Germany; Soziale Praxis, Berlin, Germany; Zeitschrift für die gesammte Staatswissenschaft, Tübingen, Germany; Zeitschrift für Volkswirtschaft, Social Politik und Verwaltung, Vienna, Austria.

## WORKS OF REFERENCE RELATING TO THE SECTION OF THE FAMILY

*(Prepared through the courtesy of Professor George Elliott Howard)*

- ADLER, FELIX, "Ethics of Divorce," in *Ethical Record*, II, III, 1889-1890.
- BEBEL, AUGUST, *Die Frau und der Sozialismus*, 31st ed., 1900.
- BERTILLON, J., *Étude Démographique du Divorce*, 1883.
- BRYCE, JAMES, "Marriage and Divorce under Roman and English Law," in his *Studies in History and Jurisprudence*, I, 1901.
- CAIRD, MONA, *The Morality of Marriage*, 1897.
- COMMONS, JOHN R., "The Family," in *American Journal of Sociology*, vol. V, 1900.
- CONGRESS ON UNIFORM DIVORCE LAWS, *Proceedings*, 1906.
- CONVERS, D., *Marriage and Divorce in the United States*, 1889.
- COOK, F. G., "The Marriage Celebration," four articles in *Atlantic Monthly*, vol. LXI, 1888.
- DIKE, S. W., *Reports of the National Divorce Reform League and its successor, the National League for the Protection of the Family, 1886-1905.*  
"Statistics of Marriage and Divorce," in *Political Science Quarterly*, vol. IV, 1889.  
"Problems of the Family," in *Century Magazine*, vol. XXXIX, 1890.  
*Theory of the Marriage Tie*, 1893.
- EDSON, CYRUS, "The Evils of Early Marriages," in *North American Review*, vol. CLVIII, 1894.
- HEINZEN, K., *The Rights of Women and the Sexual Relations*, 1898.
- HOWARD, GEORGE E., *A History of Matrimonial Institutions*, 3 vols., 1904.  
"Marriage and Divorce," in *Encyclopedia Americana*, vol. X, 1904.  
"The Problem of Uniform Divorce Laws in the United States," in *The American Lawyer*, XIV, 1906.  
"Divorce," in (Bliss, W. D. P., editor) *Encyclopedia of Social Reform*, 1906.
- MAYO-SMITH, *Statistics and Sociology*, 1895.
- MUIRHEAD, J. II., "Is the Family Declining?" in *International Journal of Ethics*, vol. VII, 1896. (An answer to C. H. Pearson, "Decline of the Family," in his *National Life and Character*, 1893.)
- OETTINGEN, ALEXANDER VON, *Die Moralstatistik*, 2d ed., 1874.
- POTTER, H. C., "The Message of Christ to the Family," in his *Message of Christ to Manhood*, 1899.
- PEABODY, F. G., "The Teaching of Jesus Concerning the Family," in his *Jesus Christ and the Social Question*, 1900.
- PEARSON, CHARLES H., "Decline of the Family," in his *National Life and Character*, 1893.
- ROSS, E. A., *Social Control*, 1901.
- SCHREINER, OLIVE, "The Woman Question," in the *Cosmopolitan*, vol. XXVIII, 1899.
- SHINN, MILLICENT W., "The Marriage Rate of College Women" in *Century Magazine*, vol. L, 1895.
- SMITH, MARY ROBERTS, "Statistics of College and Non-College Women," in *American Statistical Association Publications*, vol. VII, 1901.

SNIDER, D. J., *The Family*, 1901.

SNYDER, W. L., *The Geography of Marriage*, 1889.

STETSON, CHARLOTTE P., *Women and Economics*, 3d ed., 1900.

STRAHAN, S. A. K., *Marriage and Disease*, 1892.

THWING, C. F., and C. F. B., *The Family*, 1887.

WARD, LESTER F., *Dynamic Sociology*, 2 vols., 1883.

*Pure Sociology*, 1903.

WILLCOX, WALTER F., "The Divorce Problem," in *Columbia College Studies*, 2d ed., 1897.

"A Study in Vital Statistics," in *Political Science Quarterly*, vol. VIII, 1893.

"The Marriage Rate in Michigan," in *American Statistical Association's Publications*, vol. IV, 1895.

WHITNEY, H. C., *Marriage and Divorce*, 1894.

WOOD, THOMAS D., *Some Controlling Ideals of the Family Life in the Future*, 1902.

WOOLSEY, T. D., *Divorce and Divorce Legislation*, 2d ed., 1882.

WRIGHT, CARROLL D., "Marriage and Divorce," in *Christian Register*, vol. LXX, 1891.

*Report on Marriage and Divorce*, 1889.

## ADDITIONAL WORKS OF REFERENCE FOR THE SECTION OF THE FAMILY

*(Prepared through courtesy of Dr. Samuel W. Dike)*

For earlier and fuller presentation of some of the views set forth in this paper see a paper in the *Princeton Review*, of March, 1884, on "Some Aspects of the Divorce Question." This sketches in a crude way the various social tendencies that have produced our American divorce question. See *Christian Thought* for December, 1885, for an outline of the way in which the family has been relatively suppressed in Christianity. A discussion of the "Contract Theory of the Family and its Relation to the Same Theory in Church and State" may be found in the *Andover Review* for December, 1893. The *Andover Review* for September, 1885, in the fourth of a series of articles on the "Religious Problem of the Country Town" suggests an historic explanation of the excessive use of the communal principle, and the corresponding suppression of the family in the churches of this country. Lightfoot, Hatch, Cunningham, and Harnack should be consulted. See the *American Journal of Sociology* for December, 1901, for a plea for a more scientific treatment of the communal organizations of to-day.

The following authorities are suggested on the points of my paper: Sir Henry S. Maine's *Ancient Law*; also his *Early Law and Custom* and *Early History of Institutions*; Lecky's *History of European Morals*, and his *Democracy*; The *Ante-Nicene Fathers*, edited by Bishop Coxe; Dr. John Fulton's (canon) *Laws of Marriage*; the histories of ethical and political movements in Europe and the United States; the chapter in Bryce's *Essays in History and Jurisprudence* on "Divorce in Roman and English Law." George E. Howard's *History of Matrimonial Institutions* contains the fullest and best bibliography of its subject, and this is by far the best work on its special subject. Its presentation of original material on the history of marriage and divorce in the United States from the earliest colonial times is complete.

For statistics of marriage and divorce see the report of the United States Department of Labor made in 1889, to be brought down to date in 1907. For summaries of recent statistics see the report of the National League for the Protection of the Family for 1903.

On uniform legislation see the annual reports of the National League for the Protection of the Family, of the American Bar Association, and of the Conference of the State Commissions on Uniform Legislation.

The annual volumes of Proceedings of the Religious Education Association contain several valuable papers on the Home in Relation to the Religious Training of the Young.



## SPECIAL WORKS OF REFERENCE RELATING TO THE SECTION OF THE INDUSTRIAL GROUP

*(Prepared through the courtesy of Professor Richard T. Ely)*

- BROOKS, J. G., The Social Unrest.  
DEVINE, EDWARD T., Principles of Relief.  
ELLIS, HAVELOCK, The Criminal.  
HENDERSON, CHARLES R., The Dependent, Defective, and Delinquent Classes.  
HOWARD, GEORGE E., History of Matrimonial Institutions.  
LOMBROSO, Criminal Man.  
ROSCHER, WILH., Nationalökonomie des Ackerbaues und der verwandten Urproduction (System der Volkswirtschaft, 2. Band).  
SOMBART, WERNER, Socialism and the Social Movement in the Nineteenth Century.  
WARNER, AMOS G., American Charities.  
WEBER, ADNA F., The Growth of Cities in the Nineteenth Century.  
WILCOX, DELOS F., The American City.  
WOODS, ROBERT A. (Editor), The City Wilderness.  
ZUEBLIN, CHARLES, American Municipal Progress.

## WORKS OF REFERENCE RELATING TO THE SECTION OF THE DEPENDENT GROUP

*(Prepared through courtesy of Dr. Emil Münsterberg)*

- CHALMERS, The Christian and Civic Economy of Large Towns, Glasgow, W. Collins, 1821-26.
- CHANCE, The Better Administration of the Poor-Law, London, J. Sonnenschein, 1895.
- DEROUIN, GORY, WORMS, *Traité Théorique et Pratique d'Assistance Publique*, Paris, Librairie Larose, 1900.
- DEVINE, EDWARD T., *The Principles of Relief*, New York, The Macmillan Company, 1904.
- GERANDO, *De la Bienfaisance Publique*, 4 vols., Bruxelles, 1839.
- LALLEMAND, *Histoire de la Charité*, Paris, A. Picard & Fils, 1902.
- MONNIER, *Histoire de l'Assistance Publique dans les Temps Anciens et Modernes*, Paris, Guillaumin & Cie, 1886.
- MÜNSTERBERG, EMIL, *Die Deutsche Armengesetzgebung und das Material zu ihrer Reform*, Leipzig, Duncker & Humblot, 1887.
- NICHOLLS, *A History of the English Poor-Law, in Connection with the State of the Country and the Condition of the People*, 3 vols., London, King & Son, 1898.
- WARNER, *American Charities, A Study in Philanthropy and Economics*, New York, J. Crowell, 1894.
- WORMS, *Le Droit des Pauvres*, *Revue Philanthropique*, vols. v, vi.
- Die Armenpflege, Einführung in die Praktische Pflgetätigkeit*, Berlin, O. Liebmann, 1897.
- Bibliographie des Armenwesens (Bibliographie Charitable)*, Berlin, Carl Heymann's Verlag, 1900. Dazu I. Nachtrag, 1902. II. Nachtrag, 1906.
- Schriften des Deutschen Vereins für Armenpflege und Wohltätigkeit*, Heft 1-71, 1904, Leipzig, Verlag von Dunker & Humblot.
- Annual Reports of the Local Government Board*, London.
- Proceedings of the Central and District Poor-Law Conference, with the papers read and discussion thereon*, London, P. S. King & Son.
- Proceedings of the Annual National Conference of Charities and Corrections*, United States.
- Conseil Supérieur de l'Assistance Publique*, Paris. Fascicules.
- Congrès National d'Assistance Publique et de Bienfaisance Privée*, III, Congress, Bordeaux, 1903.

ADDITIONAL WORKS OF REFERENCE FOR THE SECTION  
OF THE DEPENDENT GROUP

*(Prepared through courtesy of Professor Charles R. Henderson)*

AMERICAN LIBRARY ASSOCIATION, Catalogue, 1904.

DEVINE, EDWARD T., Principles of Relief.

HENDERSON, CHARLES R., Introduction to the Study of the Dependent, Defective,  
and Delinquent Classes, ed. 1903.  
Modern Methods of Charity, 1904.

WARNER, A. G., American Charities.

These books contain references and bibliographies.

ADDENDA PAGES

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FOR LECTURE NOTES AND MEMORANDA OF  
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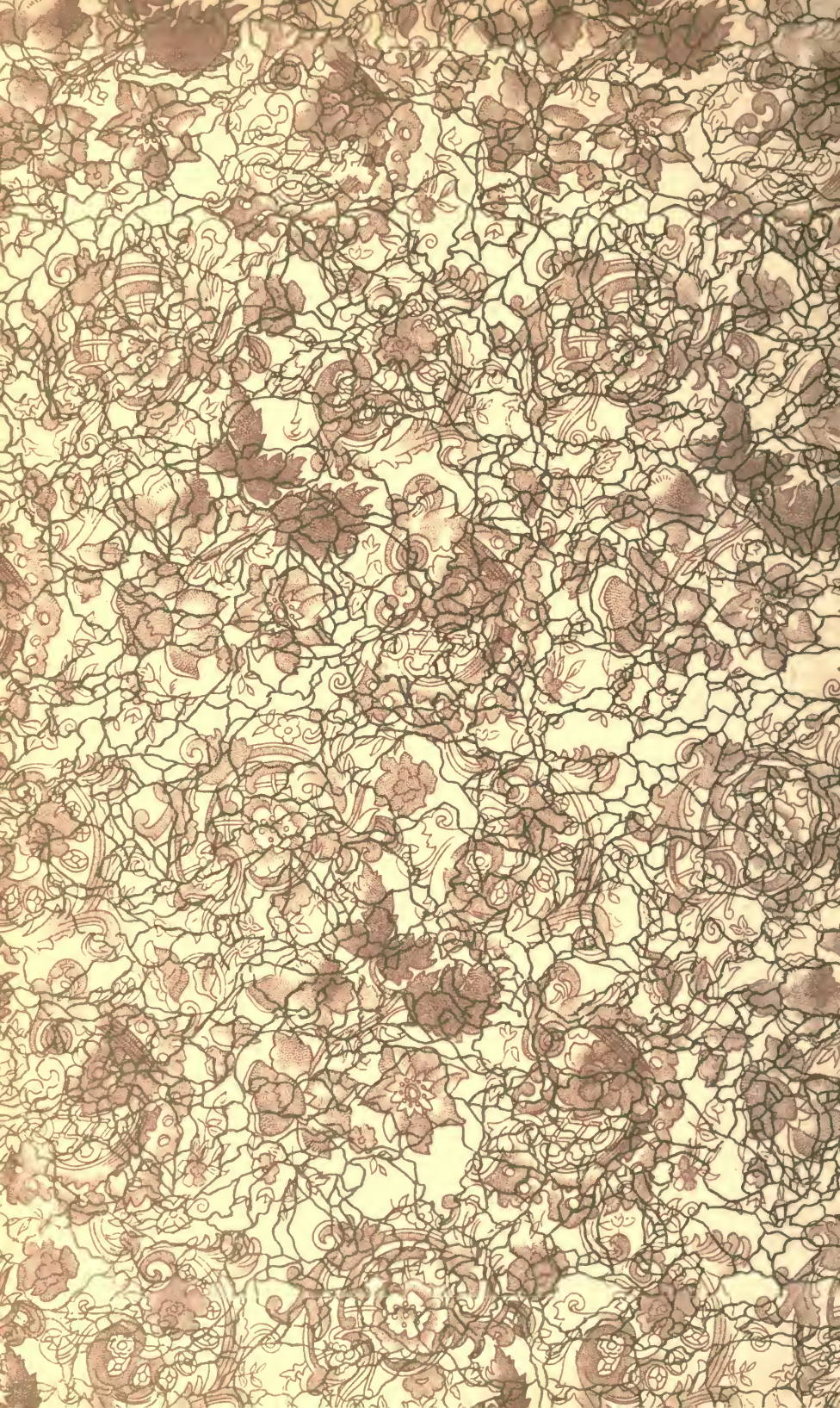






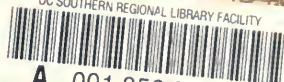








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